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RATIONALIZING A DECADE OF JUDICIAL RESPONSES TO EXCULPATORY CLAUSES

Anita Cava*
Don Wiesner**

Now Pilate, seeing that he was doing no good, but rather a riot was breaking out, took water and washed his hands in sight of the crowd, saying, "I am innocent of the blood of this just man; see to it yourselves." And all the people answered and said, "His blood be on us and on our children."¹

Pontius Pilate's *non mea culpa* qualifies as a famous attempt to excuse the effects of behavior. As Fifth Procurator of Judea, Pilate was bound by a duty to punish the guilty and protect the innocent. If he failed to act reasonably in performing either of those acts, he was accountable for the consequences. However, others could bargain to assume responsibility for those consequences, as did the people of Judea in the example reported by Matthew above.²

Pilate's "bargain" with his subjects simulates modern contracts which contain promises known as "exculpatory clauses." An exculpatory clause is a provision in a bargain that excuses a party from some duty. This article is the result of a review of 204 of the past decade's judicial decisions involving explicit exculpatory clauses.³ The review was undertaken to identify the exculpatory clause in its environment and to analyze the rationales supporting or denying its efficacy.

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1. *Matthew* 27:24, 25.

2. Pilate's motivation in this matter is somewhat explained by his dilemma as a foreign viceroy. He had been reported to Rome so frequently that he feared to be reported again for not suppressing a revolt against the emperor. Pilate also failed as a representative of justice, for he condemned Jesus to death after declaring Jesus innocent for the fourth time.

3. The authors have confined their analysis to explicit exculpatory clauses and thus treat indemnification clauses only peripherally. For an inquiry into the difficulties posed by these two related but very different contractual clauses, see Comment, *Indemnity and Exculpation: Circle of Confusion in the Courts*, 33 EMORY L.J. 135 (1984).

Exculpatory clauses are examined here in reference to the obligation to not commit negligence while performing a contract. This duty is authorized by legal implication and derives from the judicial practice of supplying missing terms or natural premises in contracts. For example, there is a line of breach of contract cases involving accountants who broke no specific promise, but who were, nevertheless, held liable because they acted negligently in carrying out their responsibilities.⁴

This article discusses exculpatory clauses in two contexts. First, it reviews cases where exculpatory clauses were vulnerable to judicial interpretation. Second, the article discusses cases where exculpatory clauses have been upheld as viable.

I. VULNERABILITY OF EXCULPATORY CLAUSES

Exculpatory clauses appear vulnerable to strict judicial standards of interpretation. When examining exculpatory clauses, courts police: (1) the technical formation of the contract, i.e., the offer and acceptance; (2) the status or position of the parties to the bargain; and (3) public policy concerns. Corbin summarizes these practices when he proposes that "those who are not engaged in a public service may properly bargain against liability for harm caused by their ordinary negligence in performance of contractual duty."⁵

Evaluating Pilate's behavior under these standards requires not only an examination of the public policy considerations that arise when a ruler absolves himself of negligence in ruling his subjects, but also a test to determine whether Pilate's "people" entered into an informed bargain. This latter test requires the application of such monitoring agents as the simple mutual assent doctrine and such legal principles that protect those of unequal bargaining power, a normally inadequate ground for relief from a contractual commitment.

Pilate's statement fails the examination on all grounds. First, rulers owe the highest duty to their public and have no right to bargain away their power. Hence, Pilate's statement was contrary to the

4. "[A]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done. A negligent failure to observe any of these conditions is a tort as well as a breach of contract." *Lincoln Grain, Inc. v. Coopers & Lybrand*, 216 Neb. 433, 437, 345 N.W.2d 300, 305 (1984). *See also* *Blumberg v. Touche Ross & Co.*, 514 So. 2d 922, 924-27 (Ala. 1987), in which a letter promising an examination of the balance sheet "in accordance with generally accepted auditing standards" was held to create a duty of care and liability in both tort and contract if not so executed.

5. 6A A. CORBIN, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 1472, at 591, 596 (1963 & Supp. 1984).

public interest. Second, it is unlikely that Pilate's subjects manifested their consent to the bargain in a manner that would satisfy contractual requirements. Whether the people of Judea were well-informed of the ramifications of their promise to assume liability for Pilate's wrongs is doubtful. The political and mob-like environment detailed in the Gospel probably diminished the people's ability to appreciate the consequences of sending innocent people to their deaths. Even more important, the people of Judea were hardly in an equal bargaining position with Pilate.

Courts uphold exculpatory clauses only if simple negligence is at issue.⁶ Evidence of gross negligence will always defeat an exculpatory clause,⁷ as will fraud⁸ and other intentional torts.⁹ Accordingly, damages allegedly based on slanderous statements made by a former employer in a recommendation could not be cleansed by a *non mea culpa* clause relieving "all parties from all liability for any damage

6. "Simple negligence" is sometimes difficult to define. In *South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 322 S.E.2d 453, 458 (S.C. Ct. App. 1984), for example, the court denied enforcement of a warranty disclaimer because it applied to negligence in manufacturing, but not to negligence in design. In addition, the doctrine of comparative negligence can limit application of the clause. In *Tate v. Mountain States Tel. & Tel. Co.*, 647 P.2d 58, 60 (Wyo. 1982), a contractual provision limiting future liability to gross negligence was held ineffective because it ran counter to the state's comparative negligence statute.

7. *Kleartone Transparent Prods. Co. v. Dun & Bradstreet, Inc.*, 88 A.D.2d 353, 453 N.Y.S.2d 433 (1982) (alleged gross negligence in failing to report collection problems to extender of credit). See also *Valuable Holding Corp. v. Midtown Vault Corp.*, 120 A.D.2d 356, 502 N.Y.S.2d 8 (1986) (loss of valuables in safe deposit box was not excused because employing a security guard knowing of his previous conversions is grossly negligent); *Third Swansea Properties, Inc. v. Ockerlund Constr. Co.*, 41 Ill. App. 3d 894, 354 N.E.2d 148 (1976) (exculpatory clause held not applicable to willful and wanton misconduct evidenced by a welder's failure to take precautions to avoid damage by fire).

8. *Laudisio v. Amoco Oil Co.*, 108 Misc. 2d 245, 437 N.Y.S.2d 502 (N.Y. Sup. Ct. 1981) (exculpatory clause ruled effective against claims of negligence, but not against claims of fraud or misrepresentation). Similarly, a charge of fraud made by a purchaser against a broker based upon representations concerning utility services withstood an exculpation clause in the contract which provided that the "[p]urchaser is relying solely upon his own examination." *Sanfillipo v. Rarden*, 24 Ohio App. 3d 164, 167, 493 N.E.2d 991, 995-96 (1985). But see *James v. Naumann*, 464 So. 2d 1260 (Fla. Dist. Ct. App.), *reh'g denied*, 476 So. 2d 674 (Fla. 1985), also a fraud action against a seller of real estate based on alleged representations concerning yield and future value. In that case, language in a sales agreement to the effect that the buyer's decision to purchase was made on his "inspection and investigation" was held to insulate the seller from this cause of action. *Id.* at 1261.

9. A claim brought by a shipping company against a carrier for conversion could not be defeated by an exculpatory clause because "[o]nce a conversion has been established, public policy bars enforcement of liability and limitation." *RGA Indus., Inc. v. Jomas Express, Inc.*, 129 Misc. 2d 1066, 499 N.Y.S.2d 28 (N.Y. App. Term. 1985). See also *Mankap Enters., Inc. v. Wells Fargo Alarm Servs., Div. of Baker Protective Servs., Inc.*, 427 So. 2d 332, 333-34 (Fla. Dist. Ct. App. 1983) (exculpatory clause may not shield the intentional misrepresentation of features of an alarm system).

that may result from furnishing same."¹⁰ The presence of accusations greater than negligence, therefore, affected the results of our review. Some beneficiaries of exculpatory clauses lost because cautious plaintiffs included a charge of gross negligence, or commission of an intentional tort¹¹ in their complaints.

The vulnerability of exculpatory clauses begins at the beginning, in the formation stages of the contract.

A. *Mutual Consent*

The cases reviewed from the past decade confirm that bargains containing exculpatory clauses do not benefit from the "freedom of contract" doctrine. Courts critically examine both the conduct of the parties manifesting assent to the bargain and the words describing the excuse. For example, one court held ineffective a registration form containing a release which did not refer to negligence and was signed while the patient was reclining in the dentist's chair just prior to treatment.¹² The court's language reflected its critical attitude toward the clause:

While . . . the law grudgingly accepts the proposition that men may contract away their liability for negligently caused injuries, they may do so . . . on the condition that their intention be expressed clearly and in "unequivocal terms."¹³

10. *Kellums v. Freight Sales Centers, Inc.*, 467 So. 2d 816, 817 (Fla. Dist. Ct. App. 1985). The clause was also ineffective as against a charge of fraud. However, the court noted that it might act "to absolve . . . any liability for invasion of privacy or tortious interference with a business relationship." *Id.* at 818.

11. See, e.g., *Morgan v. South Cent. Bell Tel. Co.*, 466 So. 2d 107 (Ala. 1985) (proof of fraud vitiates an otherwise enforceable exculpatory clause in favor of the telephone company); *Adams v. Roark*, 686 S.W.2d 73, 76 (Tenn. 1985) (summary judgment in favor of a motorcycle dragway was reversed to allow an injured plaintiff a chance to prove gross negligence); *Mankap Enters.*, 427 So. 2d at 332 (limitation of damages provision is unenforceable when the jury determines that gross negligence existed); *Douglas W. Randall, Inc. v. AFA Protective Sys., Inc.*, 516 F. Supp. 1122, 1126 (E.D. Pa. 1981).

12. *Abramowitz v. New York Univ. Dental Center, College of Dentistry*, 110 A.D.2d 343, 494 N.Y.S.2d 721 (1985). Where the ritual of offer and acceptance reflects a genuine agreement, the parties may be left where they stand or, as in *Arbegast v. Board of Educ.*, 65 N.Y.2d 161, 480 N.E.2d 365, 490 N.Y.S.2d 751 (1985), where they fall. In *Arbegast*, plaintiff student-teacher was injured while participating in a game of "donkey basketball." Her testimony that she had been informed of the risks and had agreed to accept them defeated any claims against defendant.

13. *Abramowitz*, 110 A.D.2d at 343, 494 N.Y.S.2d at 725 (citing *Van Dyke Prods. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 305, 189 N.E.2d 693, 695, 239 N.Y.S.2d 337, 340 (1963)).

1. *Transaction Defects*

To be enforceable, an exculpatory clause must initially succeed as a contractual proposition. An otherwise valid clause will not be upheld if the transaction between the parties was defective. For example, setting out exculpatory language in small print on the bottom of a report was fatal to a marine surveyor's claim that the purchaser of a boat waived all claims of negligence against the surveyor.¹⁴ The court refused to enforce the clause notwithstanding the fact that the clause was "clear and unambiguous" on its face¹⁵ and even though there was equal bargaining power between the parties:

It must be shown that [plaintiff] clearly and unequivocally agreed to the disclaimer with knowledge of its content. . . . There is no evidence the disclaimer was mentioned or bargained for. . . . [Plaintiff] did not see the exculpatory clause until he read it in the survey report.¹⁶

Similarly, an "unreadable" clause on the reverse side of an acknowledgement order made by a well driller was not enforced against a creamery when the latter sued the driller for negligent installation of machinery.¹⁷ An attempt to place an exculpatory clause in small print in letterheads and billheads was also given short shrift.¹⁸

The requirement that a party have "actual" notice of unexpected and unfavorable clauses is classically illustrated in *Blanc v. Windham Mountain Club*.¹⁹ In that case, a ski club adopted by-laws

14. *Krohnert v. Yacht Sys. Haw., Inc.*, 4 Haw. App. 190, 664 P.2d 738 (1983).

15. *Id.* at 200, 664 P.2d at 744-45.

16. *Id.*

17. *McCarthy Well Co., Inc. v. St. Peter Creamery*, 410 N.W.2d 312, 315 (Minn. 1987). The court left no doubt as to its distaste for defendant's contract.

What is fatal, however, is that the terms are printed on dark paper in tiny print. The exculpatory section appears in the middle of this impenetrable text. To read the terms and conditions with any degree of comprehension is difficult, exceedingly tedious, and even physically painful. . . . [T]his is a case where a party is not able to know what the contract terms are because they are unreadable. As a matter of law, the exculpatory clause will not be enforced.

Id. at 316.

18. *Sealand Indus. v. General Ship Repair*, 530 F. Supp. 550 (Md. 1982). The weakness of the language, a point treated in the next section, was also a ground for denying the efficacy of the clause. *Id.* at 567.

19. 115 Misc. 2d 404, 406, 454 N.Y.S.2d 383, 388-89 (N.Y. Sup. Ct. 1982), *aff'd*, 92 A.D.2d 529, 459 N.Y.S.2d 447 (N.Y. App. Div. 1983). Concerning actual notice, consider *A & Z Appliances, Inc. v. Electric Burglar Alarm Co.*, 90 A.D.2d 802, 455 N.Y.S.2d 674 (1982), in which an alarm company's limitation of damages, almost uniformly enforced as discussed in the text accompanying note 139 *infra*, was suspect because it appeared on the reverse side of a single sheet contract and was not incorporated by reference on the face sheet. The case was set for trial to determine whether the limitation "was not obscured . . . as to

containing a hold-harmless provision for injuries sustained while using the ski club facilities.²⁰ A member and his wife were injured while using a chairlift. They sued, alleging that an employee of the club had been negligent. The court found the language of the release "sufficiently clear and unambiguous,"²¹ but ruled that it could not be enforced against either party on transactional grounds. The clause was inapplicable against the member-husband because he had never received a copy of the by-laws. The court stated, "the absence of proper notification is crucial, since the viability of the defense is dependent upon the consensual nature of the agreement to exonerate one from liability for one's own negligence."²² The clause was likewise unenforceable against the wife, who was not a member of the club, knew nothing of the by-laws, and had never agreed to any club rules.²³

make it probable that it would escape plaintiff's attention." *Id.* at 803, 455 N.Y.S.2d at 675.

Similarly, in *Belger Cartage Serv., Inc. v. Holland Constr. Co.*, 224 Kan. 320, 582 P.2d 1111 (1978), a lessor's exculpatory clause did not protect him against the lessee's claims for damages because the clause was not conspicuous and there was no evidence that anyone had read it. The court in *Della Corte v. Williston Park*, 60 A.D.2d 639, 400 N.Y.S.2d 358 (1977), raised the issue of notice in terms of the extent of the parties' understanding. There, defendant engineer's inspection report may have been incomplete concerning water seepage. The court remanded the case for more information on whether the contractual disclaimer had been contemplated as being sufficient by the parties.

20. Under the terms of the clause, as a condition to membership in the ski club, each member agreed "to hold the club harmless from claims of any kind, nature, or description (including claims resulting from the negligence of an officer, employee, governor, or member of the club), arising out of the use of any of the club's facilities by such member or the member's family." *Blanc v. Windham Mountain Club*, 115 Misc. 2d 404, 406, 454 N.Y.S.2d 383, 385 (N.Y. Sup. Ct. 1982).

21. *Id.* at 408, 454 N.Y.S.2d at 387.

22. *Id.* at 409, 454 N.Y.S.2d at 388. After engaging in a thorough analysis of the language and enforceability of the clause from a transactional point of view, the court indicated that the clause would be unenforceable as a matter of public policy in New York. *Id.* at 410, 454 N.Y.S.2d at 389. *See infra* text accompanying notes 94-96, where statutory aspects of public policy are discussed.

23. *Id.* at 410, 454 N.Y.S.2d at 389. The issue of the spouse's derivative claim is an interesting facet of exculpatory clause cases. For example, *Colton v. New York Hosp.*, 98 Misc. 2d 957, 414 N.Y.S.2d 866 (N.Y. Sup. Ct. 1979), involved an agreement signed by a kidney transplant patient on the eve of the still experimental surgery. A medical malpractice suit initiated following the patient's death required the court to construe the agreement. Holding that it was a covenant not to sue rather than a true exculpatory agreement, the court enforced the agreement because the operation had been performed in a non-negligent manner. As to the surviving spouse, the court said, "[t]he agreement, of course, cannot be held to bar [her] claims, since she did not sign it. Insofar as her claims are derivative, however, they are delimited by [the deceased husband's] claims, which are in turn delimited by the agreement." *Id.* at 971, 414 N.Y.S.2d at 876.

2. Language Used

The drafters of exculpatory clauses can never be quite sure that the language they select will accomplish the desired goal. Generally, scriveners of these clauses are allowed only one chance to create a clause that will effectively limit liability for negligent acts.²⁴ As one court stated, "[U]nless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from his own negligent acts."²⁵ Consequently, in *Orkin Exterminating Co. v. Montagano*,²⁶ an apparently well-drafted form termite agreement failed a termite company when a subscriber of the company's extermination service selected a guarantee on the first page of the agreement which contained a clause refer-

24. See, e.g., *Parrino v. Royal Ins. Co.*, 484 So. 2d 282 (La. App. 1986) (a landlord-tenant exculpation clause was ruled ambiguous and did not clearly release party); *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 218 Cal. Rptr. 839 (1985) (county's exculpatory clause concerning flooding was not only void as against public policy, but also ambiguous, for it failed to state the type of flooding); *Merritt v. Nationwide Warehouse Co.*, 605 S.W.2d 250, 255 (Tenn. Ct. App. 1980), where language releasing the lessor of warehouse storage space from liability "for damage to property caused by fire, water, or any cause whatever" was declared unambiguous by a literal-minded court. The clause protected against "damage only and not to loss as by theft." *Id.* See also *Richard's 5 & 10, Inc. v. Brooks Harvey Realty Investors*, 264 Pa. Super. 384, 399 A.2d 1103 (1979) (reversing the trial court's dismissal of plaintiff's claim because the clause was sufficiently ambiguous to warrant parole evidence).

25. *Gross v. Sweet*, 49 N.Y.2d 102, 106-07, 400 N.E.2d 306, 309, 424 N.Y.S.2d 365, 367-68 (1979). There, a release signed by a first-time parachute jumper was ineffective even though the activity was not included in a statutory scheme declaring such clauses void in certain businesses. See *infra* note 94 and accompanying text. In *Geise v. County of Niagara*, 117 Misc. 2d 470, 458 N.Y.S.2d 162 (N.Y. Sup. Ct. 1983), involving a suit against a municipality for injuries sustained while tobogganing, the failure to specifically mention "negligence" or "fault" fatally infected the efficacy of the clause. The language used in the release, excusing the municipality from "any liability for any harm, injury, damage . . . including all risks, whether foreseen or unforeseen," did not clearly alert the plaintiff to the shift in responsibility. *Id.* at 472-73, 458 N.Y.S.2d at 164. But see *Battig v. Hartford Acci. & Indem. Co.*, 482 F. Supp. 338 (W.D. La.), *aff'd*, 608 F.2d 119 (5th Cir. 1979). *Battig* involved a suit against a Catholic school by the parents of a child who died from a burst appendix. Despite the tragic facts, the parents' allegations of negligence in failing to provide appropriate medical care did not survive a summary judgment motion. A clause releasing the school "from any and all liability of every nature," was effective, and the court specifically noted that the word "negligence" was unnecessary. *Id.* at 344.

Some states have addressed this language issue by statute. See, e.g., *Goyings v. Jack & Ruth Eckerd Found.*, 403 So. 2d 1144 (Fla. Dist. Ct. App. 1981), where a Florida rule requiring that "negligence" be specifically mentioned was relied upon to reverse summary judgment in favor of a camp when a child suffered mental and physical injuries on a canoe trip. The exculpatory clause providing "that reasonable precautions will be taken by Camp to assure the safety and good health of said boy/girl but that Camp is not to be held liable in the event of injury, illness or death . . ." was held to require a jury decision as to whether in fact reasonable precautions had been taken. *Id.* at 1145-46.

26. 359 So. 2d 512 (Fla. Dist. Ct. App. 1978).

ring the reader to terms listed on the back of the contract. As explained by the court:

There is not one word on this reverse side to indicate that the paragraphs are not both applicable and that in actuality they are intended to be in the alternative. Nor is there any explanation as to which one applies in this instance. The sole "tip off" as to what coverage really is, becomes apparent only when one refers back to the applicable category boxes on the preceding page of the agreement.²⁷

The Florida court refused to make this "referral" and instead ordered the company to pay for termite damage caused by defective eradication treatment.

Exculpatory clause language can also be challenged as lacking in substantive intent. For example, in *Anderson & Nafziger v. G.T. Newcomb, Inc.*,²⁸ a clause which excused the seller of a crop sprinkler from responsibility for any crop losses caused by installation or repair if the system failed. The court found that the buyer's crop loss was occasioned by a "failure to make timely delivery" rather than by defective installation or repair.²⁹ The beneficiary of a clause in a travel agency contract was no more fortunate. In *Walton v. Fujita Tourist Enters. Co.*,³⁰ a travel agent on a "familiarization trip" was injured in a hotel. The travel agent alleged negligence by the party providing and recommending the trip. The defendant joint venturers pleaded that the contractual language declaring the providers "not liable for any loss, damage or death"³¹ during the familiarization trip should be read to absolve them of any liability. The court rejected the clause because it found the language to be "ambiguous in scope."³²

Some attempts to excuse contingent or unanticipated events via generalized exculpatory clauses fared badly. *Medical Operations Management, Inc. v. National Health Laboratories, Inc.*³³ is instructive in this regard. There, a medical laboratory promised its contractor to "comply with all state and federal regulations pertain-

27. *Id.* at 513.

28. 100 Idaho 175, 595 P.2d 709 (1979).

29. *Id.* at 181-82, 595 P.2d at 716.

30. 380 N.W.2d 198 (Minn. Ct. App. 1986).

31. *Id.* at 200.

32. *Id.* at 201. Language can be labeled "ambiguous" simply for failing to use magic words. See *supra* note 24.

33. 176 Cal. App. 3d 886, 222 Cal. Rptr. 455 (1976).

ing to clinical laboratories.”³⁴ Difficulty arose when possible anti-trust violations surfaced. In rejecting the argument that the language of the contract immunized the parties from liability for noncompliance with federal law, the court considered the distinction between regulations affecting the operation of medical labs and laws concerning competition in the marketplace. The parties, it held, did not intend to impose on the defendant laboratory the “sole responsibility for assuming the legality of the enterprise structure.”³⁵

As in *Anderson & Nafziger*,³⁶ the drafter of the exculpatory clause in *Sea Land Industries, Inc. v. General Ship Repair Corp.*³⁷ could not show a substantive connection between the anticipated event as articulated and the event alleged to have taken place. In *Sea Land*, the owners of a marine terminal sued a contractor who had agreed to repair and maintain a crane. This large, land-based crane was blown down the pier and damaged. Apparently, the contractor's employee failed to secure the crane and left it unattended following its use. A thunderstorm suddenly hit the area and a high wind blew the unsecured crane down its tracks. The crane collided with the concrete stops at the seaward end of the pier, causing extensive damage.

The court's comments regarding the exculpatory clause at issue illustrate a persistent judicial concern with assessing the specific risks contemplated by the parties to a contract containing an exculpatory clause. Addressing the weakness of the clause language in relation to the risk realized, the court noted that on its face the clause was intended to apply only to ship repair work and not to the type of work performed by General Ship for the plaintiff Sea Land. The court stated, “The word ‘vessel’ is used throughout. . . . A mere reading of the language in question would indicate that it did not fit the work being performed by General Ship for Sea Land but was intended to cover only ship repair work.”³⁸

Unfortunately, judicial concern for a drafter's anticipation of events to occur during the performance of a contract raises the pro-

34. *Id.* at 890, 222 Cal. Rptr. at 458.

35. *Id.* at 895, 222 Cal. Rptr. at 466.

36. 100 Idaho at 175, 595 P.2d at 709. See *supra* note 28 and accompanying text.

37. 530 F. Supp. 550 (Md. 1982).

38. *Id.* at 567. See also, *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264 (E.D. Mich. 1976). There a suit against Mobil Oil brought by a service station owner whose business was destroyed by a fire allegedly caused by a delivery of contaminated gas. Mobil's motion for summary judgment on the basis of a limitation of consequential damages clause was denied because the court was concerned whether an uneducated plaintiff understood the force and effect of the clause.

verbal hard case. Imagine drafting a clause for an auto race. How specifically should the tragedy be described? The clause reviewed in *Arnold v. Shwano County Agriculture Society*,³⁹ may be instructive. There, a raceway attempted to deny recovery to a brain damaged race-car driver via an exculpatory clause. The plaintiff alleged that his injury resulted from the toxic fire extinguishing chemicals used in rescuing him from his burning car. The Supreme Court of Wisconsin reasoned that the release excused certain conditions contemplated by the parties, such as a negligently maintained track and even the negligent driving of another participant. However, the clause did not cover a negligent rescue operation.⁴⁰

Thus, exculpatory clauses are vulnerable to judicial scrutiny of the agreement between the parties. Failure to conspicuously and clearly delineate the operation of a clause can render it unenforceable. Yet, successfully employing these precautionary measures is no guarantee of success. Courts further patrol enforcement of the clause by examining the bargaining process itself.

B. *Bargaining Power*

We are all equal under the law, although some of us are more equal than others.⁴¹ As will be seen, insurance companies as subrogees in risk assignments and beneficiaries of exculpatory clauses are usually equal; landlords and tenants are not.⁴² Although courts rarely invoke doctrines of undue influence or duress when examining exculpatory clauses,⁴³ they do use the euphemisms "unequal bargaining power" or "no alternative opportunities" to invalidate some clauses. Even when the language of a clause is clear, courts are influenced by the relationship between the parties to a contract containing an exculpatory clause.⁴⁴ For example, a broad statement of

39. 111 Wis. 2d 203, 330 N.W.2d 773 (1983).

40. *Id.* at 212, 330 N.W.2d at 778.

41. Cf. G. ORWELL, *ANIMAL FARM* 148 (1946) ("All animals are equal, but some animals are more equal than others.").

42. See *infra* notes 46-59 and accompanying text.

43. See *In re Eagson Corp.*, 26 Bankr. 660 (E.D. Pa. 1982), where a debtor unsuccessfully tried to argue economic duress against a creditor whose contract to renovate the debtor's building contained an exculpatory clause exonerating it from any consequences unless caused by gross negligence.

44. Thus, for example, in *Salt River Project Agricultural Improv. & Power Dist. v. Westinghouse Elec. Corp.*, 143 Ariz. 368, 384, 694 P.2d 198, 214 (1984), the court found that a genuine issue of material fact existed precluding summary judgment, namely, "whether the parties were in an equal bargaining position . . . [and] whether the limitation of damages was actually bargained for." *Id.* at 384, 694 P.2d at 214. Note, however, that the inquiry is a genuine one. Upholding an exculpatory clause in an oil drilling contract, one federal court

exculpation absolving a school from "any and all liability associated with the [field trip]"⁴⁵ did not limit liability when a nursing student died on the trip. The court ruled the clause unenforceable because the nursing student had no alternative classes to take and could not but agree to the terms of the release.⁴⁶

1. *Consumer vs. Commercial*

There seems to be a genuine impression that those who sign exculpatory clauses are *prima facie* in unequal bargaining positions. This feeling may derive from cases that pit weak tenants against powerful landlords. The black letter law reflects an historical bias against enforcement of landlord-tenant leases which contain language excusing the landlord's liability for negligently maintaining or repairing the premises.⁴⁷ Typically, courts find these contracts repugnant because they perceive the landlord to be in a superior bargaining position to the tenant. For instance, in *Henriouille v. Marin Ventures, Inc.*,⁴⁸ an unemployed widower with two children receiving public assistance sued a landlord after he tripped over a rock on a common stairway in the apartment building and fractured his wrist. The landlord was held liable despite his apparent efforts to keep the premises safe in difficult circumstances.

This landlord-tenant flavor is not as prevalent in an examination of the decade's cases treating the equality issue, where the terrain is more diverse than might be expected. While some of these cases appear to be unduly stimulated by the language used, there is support for the proposition that courts deem the clause to have been

noted that "[t]he mere fact that it [is] a seller's market [does] not render unfair an otherwise reasonable, arms-length agreement." *ANR Prod. Co. v. Westburne Drilling, Inc.*, 581 F. Supp. 542, 547 (Colo. 1984).

45. *Whittington v. Sowela Technical Inst.*, 438 So. 2d 236, 241 (La. App.), *cert. denied*, 443 So. 2d 591 (La. 1983).

46. *Id.* In *Taylor v. Costa Lines, Inc.*, 441 F. Supp. 783, 787 (E.D. Pa. 1977), the validity of an exculpatory clause in travel literature immunizing a vessel owner and a tour operator from liability for injuries suffered by a passenger depended upon the agreement not being "a mere contract of adhesion, which he is powerless to alter, having no alternative other than to reject the transaction entirely."

47. See *Lloyd v. Service Corp. of Alabama*, 453 So. 2d 735 (Ala. 1984) (exculpatory clause in residential lease held unenforceable). Examinations of this trend may be found in Howell, *Exculpatory Clauses in Leases*, 29 How. L.J. 95 (1986); Note, *Exculpatory Clause in Residential Apartment Lease Held Void as "Unbargained For,"* 15 CUMB. L. REV. 765 (1984-85). Comment, *Exculpatory Clause in Lease Void as Against Public Policy*, 3 MISS. COL. L. REV. 253 (1983).

48. 20 Cal. 3d 512, 573 P.2d 465, 143 Cal. Rptr. 247 (1978).

the product of a fair fight or established precedent.⁴⁹ In one case reviewed, an aircraft owner sued an airport authority for damages suffered when the plane he was operating taxied into a construction excavation after landing.⁵⁰ The plaintiff failed to recover the expected damages award of one-half million dollars because the court viewed the transaction as an arm's length bargain between sophisticated parties. The court stated, "[I]t is not necessary that the exculpatory language refers expressly to the negligence . . . so long as the intention to indemnify can be 'clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances.'"⁵¹

Similarly, indemnification and risk-shifting provisions of a lease between an owner and lessee of a shopping center were dispassionately reviewed subsequent to a suit brought by a customer who was mugged in the center's parking lot.⁵² The injured party, a classic consumer, would have recovered in any case; the court was not moved to interfere in the allocation of risk agreed upon by the commercial entities.⁵³

These cases are representative of the decisions of the last ten years, many of which involve parties of more equal bargaining power. In disputes between commercial tenants and their landlords, the landlords have generally been successful. For example, the owner

49. *McClure Eng'g Assocs., Inc. v. Reuben Donnelley Corp.*, 101 Ill. App. 3d 1109, 428 N.E.2d 1151 (1981), *aff'd*, 95 Ill. 2d 68, 447 N.E.2d 400 (1983), presents the classic "yellow pages" scenario. In *McClure*, an engineering firm whose listing did not appear in defendant's yellow page directory was unsuccessful in its suit for damages. While disparity in bargaining power was evident, the court deemed the clause not unconscionable and upheld it. The sting of this deference to judicial precedent was noted by a strong dissent, which failed to see equal bargaining power. "It is like the story of the chicken and the pig who were asked to donate ham and eggs for dinner. It was a matter of life and death to the pig . . . so it is here." *Id.* at 1113, 428 N.E.2d at 1155 (Heiple, J., dissenting).

50. *Niagra Frontier Transp. Auth. v. Tri-Delta Constr. Corp.*, 107 A.D.2d 450, 487 N.Y.S.2d 428, *aff'd*, 65 N.Y.2d 1038, 484 N.E.2d 1047, 494 N.Y.S.2d 695 (1985).

51. *Id.* at 452, 487 N.Y.S.2d at 430 (quoting *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153, 297 N.E.2d 80, 82, 344 N.Y.S.2d 336, 339 (1973)).

52. *Stier v. Shop Rite of Manalapan*, 201 N.J. Super. 142, 492 A.2d 1055 (N.J. Super. Ct. App. Div. 1985).

53. In order for [the owner] to recover on its indemnity, the negligence of [the tenant] must be primary or active as compared to secondary or passive negligence of [owner.] Assuming that both parties are concurrently liable with no distinction in the degree of negligence, we hold that there is no factual or legal basis upon which to grant indemnification in favor of [owner]. Moreover, it appears that [owner] is liable for damages under the language of the lease which shifts the risk to [owner] for injuries arising in the common areas, insurance for which [tenant] contributes.

Id. at 156, 492 A.2d at 1062.

of a stable was sued by a lessee for the loss of his horse by theft or disappearance.⁵⁴ A clause excusing liability for "all risks . . . whether caused by the active or passive negligence"⁵⁵ of the owner bound the lessee because the language was clear and because the court found no issue of disparity in bargaining power between the parties. Likewise, a commercial tenant's argument against the enforcement of a landlord's exculpatory clause concerning water damage focused on ambiguities in the language of the contract rather than on the unequal bargaining positions of the parties.⁵⁶ Unmoved, the court enforced the clause and denied the claim for lost profits and damages resulting from a burst water pipe.

On the other hand, courts do not automatically approve contracts negotiated by parties of relatively equal bargaining power. They still search for transaction defects, especially ambiguity in the contract language, and sometimes remand for further inquiry.⁵⁷ This was the result in *Parrino v. Royal Insurance Co.*,⁵⁸ where the clause did not "clearly release" the parties from liability, and in *Richard's 5 & 10, Inc. v. Brooks Harvey Realty Investors*,⁵⁹ where the clause exonerated the landlord from liability for water damages, but not from failure to keep the roof in repair, the actual cause of the water damage.

Ultimately, the concern with bargaining power focuses on fairness, rather than on status. Courts seem to inquire into the actual status of parties to exculpatory clauses even in commercial transactions because they recognize that unfair surprise and unconscionable oppression can take place in such settings. As one court stated:

With increasing frequency, courts have begun to recognize that experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms and that even large business entities may have *relatively* little bargaining power, depending on the identity of the other contracting party and the commercial circumstances surrounding the agreement.⁶⁰

54. *Clearwater Farms, Inc. v. Roosevelt Raceway, Inc.*, 118 A.D.2d 825, 500 N.Y.S.2d 311 (1986).

55. *Id.* at 825, 500 N.Y.S.2d at 312.

56. *Fena v. Wickstrom*, 348 N.W.2d 389 (Minn. Ct. App. 1984).

57. One court invalidated the clause in a suit by a commercial tenant against a railroad using a two-pronged approach. Not only was the language of the clause ambiguous, but there appeared to be disparity in bargaining power. *Graham v. Chicago Rock Island & Pac. R.R. Co.*, 431 F. Supp. 444, 447 (W.D. Okla. 1976).

58. 484 So. 2d 282, 289 (La. App. 1986).

59. 264 Pa. Super. 384, 399 A.2d 1103 (1979).

60. *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489, 186 Cal. Rptr.

2. *Fiduciary Relationship*

Closely allied but distinguishable from the question of equal bargaining power is the more formal relationship known as the confidential or fiduciary relationship. Sometimes the status of the parties or the importance of the activity raises questions about the enforcement of an exculpatory clause, despite forthright and clear bargaining between parties who have weighed and accepted the risks. Consider *Shorter v. Drury*,⁶¹ in which a woman died from complications resulting from the surgical procedure of dilation and curettage. She had been advised by her physician of the risks of perforation of the uterus and bleeding as a consequence of the operation. The patient, a Jehovah's Witness, felt prohibited by religious doctrine from receiving blood transfusions. Prior to surgery, she and her husband, also a Jehovah's Witness, signed a document releasing the hospital and the physician from "any responsibility whatever for unfavorable reactions or any untoward results due to my refusal to permit the use of blood or its derivatives and I fully understand the possible consequences of such refusal on my part."⁶² The doctor punctured the woman's uterus during the D and C and she bled extensively. Blood transfusions would likely have saved her, but both she and her husband refused to authorize the transfusions.

Although the jury found the doctor negligent, it assigned seventy-five percent of the fault to the patient on the basis that she had assumed the risk of bleeding to death by signing the release. The Supreme Court of Washington, sitting en banc, considered whether the release constituted an assumption of the risk under the circumstances.⁶³ The plaintiff husband argued that neither he nor his wife contemplated that the doctor would perform the operation so negligently that the wife would bleed to death. Rather, he claimed that the release covered the possibility that some blood might be required during the course of a normal procedure. The defendant argued, "The [document] does not release the doctor for his negligence but only for the consequences arising out of Mrs. Shorter's voluntary refusal to accept blood, which in this case was death."⁶⁴

The court refused to bar the plaintiff's claim. Instead, it allowed the plaintiff to recover because the doctor's negligence in per-

114, 124 (1982) (emphasis in original).

61. 103 Wash. 2d 645, 695 P.2d 116, cert. denied, 474 U.S. 827 (1985).

62. *Id.* at 649, 695 P.2d at 119.

63. *Id.*

64. *Id.*

forming the operation had proximately caused his wife's death. The question thus presents itself: what is negligence in this situation? If puncturing the uterus is an acknowledged risk of the operation and its attendant bleeding is predictable, then the agreement not to accept blood and the release of the consequences should be effective. Nevertheless, the court refused to take that analytical step, invoking instead a public policy prohibition of negligence releases in medical matters. It is as if the law placed the burden on the doctor who, knowing he had no safety net in the form of blood transfusions to save this patient's life in the event of bleeding, performed the operation regardless.⁶⁵

The higher duty of care expected of medical professionals seems to be a standard feature of exculpatory clause doctrine.⁶⁶ However, the past decade's cases yielded no clear statutory policy on the effectiveness of medical releases. This absence is interesting, since it would seem that fiduciary doctrine would be most stringent in statutory law. Some states have proscribed exculpatory clauses by statute in certain areas.⁶⁷ Also, courts reveal no particular overriding concern beyond the validity of the agreement and the power of the parties when handling exculpatory clauses used in other professional relationships.

It is surprising that professionals have not generally been harmed by the fiduciary factor, despite the fact that the range of parties qualifying as professionals has grown.⁶⁸ For example, Dun and Bradstreet, a credit reporting agency, was sued by a subscriber for a negligently assembled report. The agency was sheltered by con-

65. *But see Colton*, 98 Misc. 2d 957, 414 N.Y.S.2d 866 (1979), where the experimental nature of a kidney transplant was held to require enforcement of a covenant not to sue executed by the deceased recipient of the transplant.

66. Another medical case that emerged in our review was *Olson v. Molzen*, 558 S.W.2d 429 (Tenn. 1977), where the Supreme Court of Tennessee had no problem declaring an exculpatory clause in an agreement signed by a patient as a condition to receiving an abortion invalid as against public policy. *See also infra* notes 86-90 and accompanying text on public policy.

67. *See, e.g.*, N.Y. GEN. OBLIG. LAW §§ 5-321 - 5-332 (McKinney 1987) concerning lessors of real property, caterers, places of public amusement as outlined in text and notes, *infra* at 94. *See also* GA. CODE ANN. § 44-7-2 (1982) (landlord and tenant leases); ILL. REV. STAT. chs. 80, 991 (1987) (exculpatory clauses unenforceable in real property leases); IND. CODE ANN. § 26-2-5-1 (West 1980) (construction and design contracts).

68. "It is clear that the term 'professional services' is no longer limited to the traditional professions of law and medicine." *Ehrlich v. First Natl. Bank*, 208 N.J. Super. 264, 288, 505 A.2d 220, 233 (N.J. Super. Ct. 1984) (quoting *Autotote Ltd. v. N.J. Sports & Expo. Auth.*, 85 N.J. 363, 371 (1981)). In *Ehrlich*, a psychiatrist-investor sued the bank for mismanagement of a custodial securities account. The court decided to hold the bank to "professional" standards and refused to enforce the exculpatory clause. *Id.* at 288, 505 A.2d at 225.

tractual language stating that it "does not and cannot guarantee the correctness or completeness of information furnished."⁶⁹ The court found the clause effective because the contract was "entered into freely by parties concerning their private affairs and is not an adhesion contract."⁷⁰ However, the court denied the defendant's summary judgment motion in order to provide plaintiff an opportunity to prove gross negligence. Similarly, the claim of an investor who sued Citicorp for losses suffered in an advisory account was swiftly dispatched by an unsympathetic court.⁷¹

Engineers have also benefited from exculpatory clauses. In *Harman v. C.E. & M., Inc.*,⁷² a landowner's oral agreement to excuse an engineer for any responsibility arising from the design of a foundation slab that ultimately proved defective was enforced. Similarly, an independent inspector sued by an insurer for failing to discover and disclose a serious risk of flooding had an effective shield in language providing that "we do not assume any legal liability due to misinformation given our inspector nor for inaccuracies, human error, etc."⁷³ A homeowner was unsuccessful in his quest to obtain damages from a termite company for termite infestation when the contract limited the damages recoverable to retreatment.⁷⁴ In each case, the court failed to impose any specific obligation upon the "professional."

Unfortunately for those in the real estate business, there appears a contrary tendency toward liability. While sellers and purchasers are not exactly in a fiduciary relationship, the former's overriding knowledge and control over the details of the transaction

69. *Fidelity Leasing Corp. v. Dun & Bradstreet, Inc.*, 494 F. Supp. 786, 788 (E.D. Pa. 1980).

70. *Id.*

71. *Piercy v. Citibank N.A.*, 101 Misc. 2d 302, 424 N.Y.S.2d 76 (N.Y. Sup. Ct. 1978).

72. 493 N.E.2d 1319 (Ind. Ct. App. 1986). *See also* *W.H. Lyman Constr. Co. v. Gurnee*, 84 Ill. App. 3d 28, 403 N.E.2d 1325 (1980), where a contractor's suit against an engineering firm and others for breach of warranty of accuracy and sufficiency of plans and specifications was only partially successful against an exculpatory provision.

73. *Mutual Marine Office, Inc. v. Atwell, Vogel & Sterling, Inc.*, 485 F. Supp. 351, 353 (S.D.N.Y. 1980). *See also* *American Druggists' Ins. Co. v. Equifax, Inc.*, 505 F. Supp. 66, 68 (S.D. Ohio 1980) (an inspector who reported on the wrong building for a fire insurer was insulated from liability by a clause providing that "accuracy is not guaranteed"). *But see* *Rubin v. AMC Home Inspection & Warranty Serv.*, 175 N.J. Super. 315, 324, 418 A.2d 306, 311 (N.J. Super. Ct. 1980) (a homebuyer's suit against a home inspection service was not barred by an exculpatory clause because the language of the agreement was not sufficiently clear); *Kuyper v. Gulf Oil Corp.*, 410 A.2d 164 (Del. Super. Ct. 1979) (a suit against a chimney cleaning company was remanded on the issue of whether an exculpatory clause excused a duty to inspect).

74. *Wilcher v. Orkin Exterminating Co.*, 145 Ga. App. 551, 244 S.E.2d 101 (1978).

militate toward imposing a certain standard on their behavior.⁷⁵ For example, in a suit by home buyers against a builder-vendor, an exculpatory clause succumbed to the duty of the builder to comply with the implied warranty of habitability.⁷⁶ The court said that the warranty of habitability "is implied as a separate covenant between the builder-vendor and the vendee because of the unusual *dependent* relationship existing between them."⁷⁷ Likewise, a seller's attempt to limit his liability in a real estate contract involving a time share condominium received the following judicial rebuke: "[T]his provision [limiting liability to the return of purchaser's deposit] renders the seller's obligation wholly illusory and would permit him to breach with impunity."⁷⁸

The vulnerability of exculpatory clauses in real estate contracts is great unless the consideration is nominal and the clause affects the deal only peripherally. One can hardly challenge the substantive fairness of the decision in *Lynch v. Santa Fe National Bank*.⁷⁹ In that case, the bank, acting as escrow agent, agreed to deliver some documents under certain conditions for a fee of forty-five dollars. The conditions under which the documents were to be released were not clearly articulated. As a result, the bank delivered the documents in error. The bank sought protection from liability for its error under an exculpatory clause.⁸⁰ The court enforced the clause, citing the modest fee paid the bank, the dangers involved in the execution of the duty, and the lack of any strong public interest in the transaction.⁸¹

75. For a discussion of fiduciary factors and realtors, see Sacasas & Wiesner, *Realtor as "Superbroker": Great Expectations Unrealized?*, 21 AKRON L. REV. 1 (1987).

76. *Park v. Sohn*, 90 Ill. App. 3d 794, 414 N.E.2d 1 (1980), *aff'd in part and rev'd in part*, 89 Ill. 2d 453, 433 N.E.2d 651 (1982).

77. *Id.* at 797, 414 N.E.2d at 4 (quoting *Petersen v. Hubschman Construction*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979)).

78. *Port Largo Club, Inc. v. Warren*, 476 So. 2d 1330, 1333 (Fla. Dist. Ct. App. 1985).

79. 97 N.M. 554, 627 P.2d 1247 (N.M. Ct. App. 1981).

80. As a controlling part of the acceptance of this escrow, the Bank shall not be liable for any of its acts or omissions done in good faith, nor shall it be liable for any claims, demands, losses or damages made, claimed, or suffered by any party to this escrow, excepting such as may arise through or be caused by the Bank's wilful or gross negligence.

Id. at 556, 627 P.2d at 1249.

81. The court noted that the public interest factor would have mandated a different result in California, where this transaction is regulated by statute. *Id.* at 559, 627 P.2d at 1253. For a critique of this decision in light of the *Tunkl* criteria, see Note, *A Bank's Liability for Ordinary Negligence: Lynch v. Santa Fe National Bank*, 12 N.M.L. REV. 821 (1982).

The lack of an articulated public policy fueled the decision in *Kelley v. Astor Investors, Inc.*, 123 Ill. App. 3d 593, 462 N.E.2d 996 (1984), *aff'd*, 106 Ill. 2d 505, 478 N.E.2d 1346

The fiduciary standard does not apply to the occasional case where a seller attempts to excuse his misrepresentations, innocent or otherwise,⁸² or where insurance undertakings are at issue.⁸³ For example, one case involved a builder who failed to install a septic tank system properly.⁸⁴ The contract was silent as to the specific manner in which this duty was to be performed. The builder argued that language in the contract limiting liability was intended to address negligence in installing septic tanks. The court disagreed. Having undertaken the task, the builder had an absolute obligation to properly install the system.⁸⁵

Obviously, the power and status of the parties play important roles in the judiciary's handling of exculpatory clauses. However, the approach taken frequently merges into that area of "overall fairness" policed by public policy. Indeed, the role of public policy in this area of law cannot be underestimated. Whether used as a sword against the clause, or as a shield, public policy merits close examination in any analysis of exculpatory agreements.

C. *Public Policy*

The contract term "exculpatory" is almost a flash word stimulating comment on issues of "public policy." The connection is warranted. Clothing a rationale within the mantle of public policy is a powerful judicial technique. Although its presence was sometimes

(1985), where condominium owners sued an interim Board of Managers for damages based on structural defects in the common elements. The owners were unsuccessful in establishing a contractually-implied duty sufficient to overcome an exculpatory clause. Finding no formal policy statements on the issue, the court noted that "such legislative silence prevents this court from injecting such a restriction, no matter how beneficial the attempted innovation might be." *Kelley*, 123 Ill. App. 3d at 559, 462 N.E.2d at 1000.

82. *Maples v. Charles Burt Realtor, Inc.*, 690 S.W.2d 202, 213 (Mo. Ct. App. 1985) (a broker's exculpatory clause was considered mere "boilerplate" recital . . . wholly ineffective [against] liability for specific fraudulent representations" concerning termite damage); *Zuckerman-Vernon Corp. v. Rosen*, 361 So. 2d 804, 806 (Fla. Dist. Ct. App. 1978) (a suit against vendors, brokers, and others was not barred by language excusing responsibility for untrue facts because one "cannot contract against liability for [one's] *own fraud*") (emphasis in original). *But see James v. Naumann*, 464 So. 2d 1260 (Fla. Dist. Ct. App. 1985), *reh'g denied*, 476 So. 2d 674 (Fla. 1985) (a sales agreement clause that a buyer's decision to purchase was based on his own inspection and investigation insulated the seller from liability for fraud).

83. *Metropolitan Art Assocs., Div. of Metro Art Sales, Inc. v. Wexler*, 118 A.D. 548, 499 N.Y.S.2d 164 (1986), where tenants prevailed in their suit against a landlord for negligently permitting smoke and soot to emit from a heating unit, damaging tenants' personal property. The court, in denying an exculpatory clause, noted that while a mutual waiver of liability is ineffective, a clause requiring "any party" to obtain insurance would be permissible.

84. *Rodriguez v. Gilbertie*, 33 Conn. Supp. 582, 363 A.2d 759 (1976).

85. *Id.* at 585, 363 A.2d at 761.

disguised,⁸⁶ this technique affected many of the decisions involving exculpatory clauses examined here. Its influence can be observed in cases where public policy governs the mechanics of offer and acceptance and imposes a restraint upon a favorable interpretation of an exculpatory clause.⁸⁷ Courts and doctrinal writers employ the public policy sword most heavily as a frontal attack on the clause.

1. *Generally*

What is public policy? Is it nothing more than a composite of constitutional and statutory provisions and judicial decisions?⁸⁸ Or does it have vulgar components as well?

In many of its aspects the term public policy is but another name for public sentiment. Like public sentiment, that which we call public policy is often shifting and lacks the permanency upon which principles of law are, or should be, based, although there are features of public policy which are as enduring and immutable as the law of gravity.⁸⁹ Modern thought unpretentiously views public policy as a "principle of judicial legislation or interpretation founded on the current needs of the community."⁹⁰

The decade's cases indicate that exculpatory clauses are denied sometimes as a matter of principle and at other times as a matter of pragmatism. The latter procedure is suggested in cases where the injury at issue aroused the court's compassion so that the relevant exculpatory clause could not succeed regardless of the legal merit of the proponent's argument.⁹¹ On the other hand, as a matter of prin-

86. An exculpatory provision of a utility company's tariff was not enforced in *De Francesco v. Western Pennsylvania Water Co.*, 329 Pa. Super. 508, 478 A.2d 1295 (1984). The court reasoned that otherwise the water company would have no reason to insure adequate pressure to extinguish fires. Moreover, as a matter of public policy, the utility was in the best position to reduce risk; the customer had no control over such things as water pressure and was generally unaware of the existence of such a clause.

87. See *supra* notes 12-40 and accompanying text (sections I., A., 1.-2.).

88. B. CATALDO, F. KEMPLIN, & C. WEBER, *INTRODUCTION TO LAW AND THE LAW PROCESS*, 600 (3d ed. 1987) [hereinafter CATALDO]. See also Kelley, 123 Ill. App. 3d at 598, 462 N.E.2d at 1000, noting that "[p]ublic policy, while not precisely defined, is located by reference to the State constitution, State statute, judicial decisions, and the constant practice of government officials."

89. CATALDO, *supra* note 88, at 601 (quoting *Neazey v. Allen*, 173 N.Y. 359, 66 N.E. 103 (1903)).

90. Winfield, *Public Policy and the English Common Law*, 42 HARV. L. REV. 76, 92 (1928), noted in CATALDO, *supra* note 88, at 601.

91. The Supreme Court of Wisconsin refused to enforce an exculpatory clause in *Arnold v. Shawano County Agric. Soc.*, 111 Wis. 2d 203, 330 N.W.2d 773 (Wis. 1983), where a race car driver alleged that his serious injuries were not the result of the crash, but rather were caused by toxic substances used to extinguish the fire while rescuing him. Similarly, in another

ciple, it is interesting to speculate how some clauses succeeded because causation questions tempered the initial negative attitude courts entertained toward the clauses. This last point will be more fully developed in the section reviewing the vitality of exculpatory clauses. For the present, we will comment on public policy as it is openly advanced in the cases of the past decade through statutory or judicial techniques.

2. *Statutory Public Policy*

Formal statements by a legislative body take the form of statutes. Statutes are positive law within a jurisdiction. If a state statute expressly invalidates exculpatory clauses that attempt to exempt barbers from negligence in shaving their customers, a court would deny the enforcement of such a clause by effortlessly applying the statute.⁹²

As a matter of judicial restraint and nicety, it would hardly be necessary to dwell on public policy issues where a statute addressing exculpatory clauses was clear or involved constitutional principles.⁹³ New York, for example, has a relatively comprehensive statutory scheme in which exculpatory clauses in specific areas are declared void.⁹⁴ Lessors of real property,⁹⁵ caterers, and building service or

type of case where the clause usually stands, the Supreme Court of Tennessee allowed the injured motorcycle racer an opportunity to prove gross negligence in selecting material for certain posts located near the finish line. *Adams*, 686 S.W.2d 73 (Tenn. 1985).

92. This positive law can take various forms. A court can look to safety ordinances, *John's Pass Seafood Co. v. Weber*, 369 So. 2d 616 (Fla. Dist. Ct. App. 1979) (the failure of a lessor to provide fire extinguishing equipment was not encompassed by exculpatory language in the lease) as well as specific statutory law. *See, e.g., Deese v. Parks*, 157 Ga. App. 116, 276 S.E.2d 269 (1981) (Georgia statutes prohibit exculpatory clauses in construction and repair contracts and in residential landlord-tenant agreements); *First Fin. Ins. Co. v. Purolator Sec. Inc.*, 69 Ill. App. 3d 413, 388 N.E.2d 17 (1979) (Illinois by statute has declared such clauses inapplicable in business leases, health club memberships, stock car racing, the rental of riding equipment and stabling of horses, but not in burglar alarm cases); *La Frenz v. Lake County Fair Bd.*, 172 Ind. App. 389, 360 N.E.2d 605 (1977) (Indiana statutes invalidate exculpatory clauses in construction and design contracts, but not in highway construction).

A court can also use general statutory law to implement strongly held public policy beliefs such as that a seller should be liable for defective or mislabeled seed. *Agricultural Servs. Ass'n, Inc. v. Ferry-Morse Seed Co., Inc.*, 551 F.2d 1057 (6th Cir. 1977) (applying California law).

93. *NAACP v. Detroit Police Officers Ass'n*, 591 F. Supp. 1194, 1201 (E.D. Mich. 1984), *injunction orders rev'd*, 821 F.2d 328 (6th Cir. 1987), where black police officers' action against the city of Detroit was not encumbered by an agreement which affected affirmative action duties. The court stated that parties cannot "by contract limit their liability for pre-existing constitutional violations."

94. N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1978) (lessors of real property); § 5-322 (caterers and catering establishments); § 5-322.1 (owners and contractors involved in construction); § 5-323 (building service or maintenance contractors); § 5-324 (architects, engineers

maintenance contractors, for instance, cannot immunize themselves from the consequences of their own negligence, even if the immunization is the product of a fair bargain. A typical statute, in this case concerning places of public amusement or recreation, provides:

Every covenant, agreement or understanding pursuant to which such owner or operator receives a fee for the use of such facilities, which exempts owner from liability for damages caused by or resulting from the negligence of the owner, operator, or person in charge, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.⁹⁶

Statutes such as this often stimulate and inform the public policy dimension of judicial decisions regarding exculpatory clauses even if the facts of the dispute are not exactly on point. In *Geise v. County of Niagara*,⁹⁷ the plaintiff was injured while tobogganing in a county-owned facility. He invoked the language of the statute noted above in his suit against the county. The court refused to strike down the County's exculpatory clause under the statute because the plaintiff had not paid for admission to the facility, as required by the statute. However, the court did deny summary judgment to the defendant, preserving for review the language of the release.⁹⁸

Sometimes statutes assist those who argue for the disqualification of exculpatory clauses. In *Blanc v. Windham Mountain Club, Inc.*, a clause already weakened by transaction defects was found to be "in clear conflict with the public policy of the State" as expressed by the New York statute noted above.⁹⁹ The defendant's attempt to carve out an exception for private membership clubs from this rule drew this response:

Whether the exculpation of liability be hidden in barely legible print on the reverse side of an admission ticket, or buried in

and surveyors); § 5-325 (garages and parking places); § 5-326 (pools, gymnasiums, public amusement places).

95. Note the exception that it is permissible to require a property owner to purchase insurance as the sole remedy for negligence in real property contracts. Board of Educ. v. Valden Assocs., 46 N.Y.2d 653, 389 N.E.2d 798, 416 N.Y.S.2d 202 (1979).

96. N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1978).

97. 117 Misc. 2d 470, 458 N.Y.S.2d 162 (1983).

98. The agreement, which included a general release for "any liability for any harm, injury, damage including all risks whether foreseen or unforeseen" needed to say "negligence" or "neglect" or "fault" to be effective. *Id.* at 471, 458 N.Y.S.2d at 164. See *supra* note 25 and accompanying text.

99. 115 Misc. 2d 404, 410, 454 N.Y.S.2d 383, 389 (N.Y. Sup. Ct. 1983) (citing N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1978)).

some unnoticeable portion of a membership application, or, as here, concealed within separate unpublished by-laws of the establishment, the end result is to conceal from consumers that the owner or operator sought to absolve itself of liability.¹⁰⁰

Public policy, like public opinion, is a useful but not always certain guide. It can tell the draftsman where not to go, but not where or how far to go.¹⁰¹ Idaho, for example, enacted a statute which required licenses for outfitters and guides. The only duties imposed upon those persons were the payment of fees and the maintenance of general businessworthy conditions.¹⁰² These responsibilities were expanded when the Legislature amended the statute.¹⁰³ Along with some specific duties to be observed by outfitters and guides, the amendment listed the general duty "to conform to the standard of care expected of members of [the] profession."¹⁰⁴

Idaho's amended outfitters and guides statute was discussed in *Lee v. Sun Valley Co.*¹⁰⁵ In that case, a horse rider was injured when his horse reared and his saddle slipped. The rider sued the resort company that had provided the horse, alleging that an employee had improperly readjusted the cinch on the horse's saddle. The contract between the rider and the resort company contained an exculpatory provision that was specific and that fairly informed the signer of the risks involved.

The trial court entered summary judgment against the rider, who appealed to the Supreme Court of Idaho. The principal issue on appeal was whether the Idaho statute regulating outfitters and guides imposed a public duty on the defendant. As the court noted, "[t]he idea of a public duty is closely related to the idea of public

100. *Id.* at 412, 454 N.Y.S.2d at 390.

101. This lesson was learned by a commercial carrier whose contract stipulated that it would be immune from their own, or their agent's, negligence. The court held that while private carriers can so contract, commercial ones cannot, unless the consignee receives some consideration for the limitation, such as lower rates. *Caribbean Produce Exch., Inc. v. Sea Land Serv., Inc.*, 415 F. Supp. 88 (D.P.R. 1976).

102. IDAHO CODE §§ 36-2101 - 36-2118 (1987).

103. The Legislature recognizes that there are inherent risks in the recreational activities provided by outfitters which should be understood by each participant. These risks are essentially impossible to eliminate by outfitters and guides. It is the purpose of this chapter to define those areas of responsibility and affirmative acts for which outfitters and guides shall be liable for loss, damage, or injury, and to define those risks which the participant expressly assumes and for which there can be no recovery.

Id. at § 6-1201.

104. *Id.* § 6-1204.

105. 107 Idaho 976, 695 P.2d 361 (1984).

policy and it is within the domain of the legislature, elected by the public, to determine such duties and policies."¹⁰⁶ The Supreme Court affirmed the lower court and ruled that the agreement absolved the defendant of common law duties. The court, however, did not absolve defendant of such statutory duties as that required by the standard of the profession. Unfortunately for the plaintiff rider, the court was not satisfied that the rider had supplied evidence on the standard of care expected of the outfitters and guides. The defendant, on the other hand, had provided affidavits of due care and the deposition of the plaintiff in support of the successful motion for summary judgment.

The case would not be remarkable if the public policy issues raised therein were found irrelevant on the grounds that the guide, the defendant's agent, was not negligent when he readjusted the cinch. A strong dissent by two justices focused on both public policy issues and the procedural posture of the case. The heaviest criticism came from Justice Bistline, who charged that enforcement of the contract would "make a mockery of a substantial part"¹⁰⁷ of the statute, which stood as a "statement of public policy of the State of Idaho with respect to outfitters, guides, and their activities."¹⁰⁸ Such enforcement, he argued, would open the door to the extinguishment of every obligation of law.¹⁰⁹ His dissenting opinion concluded:

If the statutory mandate can be avoided by an exculpatory clause, unquestionably, every person licensed under the Outfitters and Guides Act, could by contract, absolve himself completely of all obligations to the public and there would be no need for the enactment of that legislation.¹¹⁰

It is unclear to these readers whether public policy now favors outfitters and guides. However, it does seem evident that the majority views the statute as literally protecting the public.¹¹¹

106. *Id.* at 979, 695 P.2d at 363.

107. *Id.* at 983, 695 P.2d at 368.

108. *Id.* at 982, 695 P.2d at 367.

109. *Id.*

110. *Id.* at 984, 695 P.2d at 369.

111. A Georgia court, finding "no statute which either expressly or impliedly forbids contractual waivers of liability by participants in sporting or recreational events," enforced a similar release in a case involving similar facts. *Carrion v. Smokey, Inc.*, 164 Ga. App. 790, 791, 298 S.E.2d 584, 585 (1983). *But see* *O'Connell v. Walt Disney World Co.*, 413 So. 2d 444 (Fla. Dist. Ct. App. 1982) in which a release in favor of a stable at Disneyworld was not enforced on language and transaction grounds.

3. *Judicial Public Policy*

In the absence of legislative instruction, courts articulate public policy assisted only by judicial precedent and their own estimation of the community's sensitivities. The opportunity to express public policy was available to the United States Supreme Court in an admiralty case involving the tug towing business. *Bisso v. Inland Waterways Corp.*¹¹² involved a towing contract containing an exculpatory clause which provided that certain towing should be at the sole risk of the plaintiff barge-owners. Another provision in the agreement made the barge owners the masters of the towboat's crew. The expected scope of behavior was unpretentious, the range of risky maneuvers was narrow, and the parties to the undertaking were sophisticated. While being towed by defendant's tug, the plaintiff's barge collided with a bridge and sank. The towing was performed negligently. The Supreme Court ruled that the exculpatory clause was against public policy. Applying judge-made admiralty law, which discourages negligence in the field of towing, the Court said that the elimination of exculpatory clauses in such cases prevents tugowners from overreaching those in need of towing.¹¹³

The policy conclusions reached by the majority in *Bisso* have not been extended to other business contractor cases, where the scope of activity is broader and the risks far greater than those present in the tug-towing business. A number of cases involving ship repair wrestle with an apparently standard exculpatory term called a "red letter" clause. Such clauses typically state that a contractor "shall not be liable . . . to or by any vessel . . . or individual . . . in contract, tort or otherwise, to its owners, charterers, underwriters, etc., for any injury, loss or damage to or by such vessel . . . or person or for any consequences thereto."¹¹⁴

In *Hudson Waterways Corp. v. Coastal Marine Service, Inc.*,¹¹⁵ a shore-based contractor engaged in repair work on a vessel allowed a ramp extending from its work barge to shore to become slippery with mud. Neither handrails nor cleats were provided to aid parties traversing the ramp. The vessel owner employed a seaman who slipped and fell on the ramp while descending from the contractor's barge to the shore. The vessel owner was required to pay dam-

112. 349 U.S. 85 (1955).

113. *Id.* at 90.

114. *Hudson Waterways Corp. v. Coastal Marine Serv., Inc.*, 436 F. Supp. 597, 605 (E.D. Tex. 1977).

115. *Id.*

ages to the seaman and then sought indemnification and/or contribution from the contractor.

The contractor's main defense was to invoke the immunity granted him by the red letter clause. Examining this defense under federal maritime law, the court noted, "If the contract does in some way cause real harm to the public, then the court should not hesitate to refrain from enforcing it."¹¹⁶ The vessel owner pressed the court to apply the *Bisso* rule to the dispute. The court refused, stating:

It appears to the Court that the *Bisso* decision, which held that release of liability clauses in towing contracts were void, was based on the particular characteristics of the towing industry, and the Supreme Court did not make a determination that release of liability clauses were against public policy and void in all contracts concerning admiralty matters.¹¹⁷

Although the red letter clause was enforced in this case, it is important to note that the clause did not affect the rights of third parties. For instance, the seaman could have sued the contractor directly. The clause was exposed to attack only by a professional commercial contractor.

Although the tug-towing business has a public interest feature by judicial mandate, later courts have not freely applied the rationale used in tug-towing cases to disputes involving other ship businesses.¹¹⁸ Red letter clauses have been most effective in what might be called the acetylene torch cases. In *Coastal Iron Works, Inc. v. Petty Ray Geophysical, Division of Geosource, Inc.*¹¹⁹ for example, a shipyard sought a declaratory judgment to limit liability arising from a fire which damaged a ship undergoing repairs. The court enforced the shipyard's exculpatory clause stating that a "shipyard contract limiting liability will be upheld so long as the parties to the contract have more or less equal bargaining strength."¹²⁰

116. *Id.* at 605.

117. *Id.* at 606.

118. Public policy arguments are virtually useless in ship repair cases. The complex relationships among repair parties, owners, and insurance companies is examined at great length in *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 467 F. Supp. 1257, 1298 (E.D. La. 1978), *aff'd in part and rev'd in part*, 674 F.2d 401 (5th Cir. 1982). In *M/V American Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483 (9th Cir. 1983), where the clause was effective in excusing the defective installation of a rudder, the court ruled that the mere fact that the exculpatory clause was standard did not make it a contract of adhesion.

119. 783 F.2d 577 (5th Cir. 1986).

120. *Id.* at 583. *See also* *Morton v. Zidell Explorations, Inc.*, 695 F.2d 347 (9th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983), where tugboat owners sued a shipyard for negligence after the ship was almost destroyed by fire during the course of conversion into a fish-processing vessel.

Courts often do not approve of red letter clauses being used against individual workers, even when the workers qualify legally and technically as independent contractors. In *Lopez v. A/S and D/S Svendborg*,¹²¹ a longshoreman working cargo in the hold of a ship was injured when the cargo shifted and packages were broken open. The court ruled that the Shipyard's red letter clause was void as being against public policy under the Harbor Workers Compensation Act.

Sometimes judicial opinions produce formulae. One scheme for evaluating exculpatory clauses that contains a strong emphasis on public policy is reported in *Tunkl v. Regents of the University of California*.¹²² There, a hospital admission form contained a clause which released the hospital from future negligence. In evaluating the enforceability of the clause, the California Supreme Court set forth several criteria to determine whether policy concerns should render the clause void.

According to *Tunkl*, a court should first inquire whether the business is generally subject to or suitable for public regulation and whether the party seeking to be excused under the clause is performing a "service of great importance to the public."¹²³ Second, whether the individual appears willing to perform this service for any member of the public and the relative bargaining strength of the parties in the economic setting of the transaction are important.¹²⁴ Courts should be suspicious when examining a "standardized adhesion contract of exculpations," if the party advancing the clause has superior bargaining power.¹²⁵ Finally, the extent to which "the property or the person of the purchaser is placed under the control of the seller" should be gauged in giving efficacy to the clause.¹²⁶ This formulation has achieved prominence in the case law and is invoked as a public policy yardstick by some courts.¹²⁷

121. 581 F.2d 319 (2d Cir. 1978).

122. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

123. *Id.* at 101, 383 P.2d at 446, 32 Cal. Rptr. at 38-39. This determination may be made as a matter of public policy by reference to statutory or generally accepted judicial categories, or it may be a case-by-case decision. For example, in *Cregg v. Ministor Ventures*, 148 Cal. App. 3d 1107, 196 Cal. Rptr. 724 (1983), the court held that the operator of a storage space was not precluded from incorporating an exculpatory clause against its lessees by the public interest inquiry mandated by *Tunkl*.

124. *Tunkl v. Regents of the Univ. of Ca.*, 60 Cal. 2d 92, 101, 383 P.2d 441, 446, 32 Cal. Rptr. 33, 38 (1963).

125. *Id.*

126. *Id.*

127. *See, e.g.*, *Porubiansky v. Emory University*, 156 Ga. App. 602, 275 S.E.2d 163 (1980), *aff'd*, 282 S.E.2d 903 (1981), citing *Tunkl* in reversing the trial court's grant of sum-

Medical or quasi-medical activities which affect lives meet public policy tests, whether of the *Tunkl* genre or otherwise. For example, in *Tatham v. Hoke*,¹²⁸ a patient signed an agreement which contained a 30-day notice of claim provision and which limited damages to \$15,000. The patient successfully sued a physician who performed an abortion negligently because the agreement was found to be against public policy. A dental school fared no better in *Porubiansky v. Emory University*,¹²⁹ despite the fact that the school was primarily a training institution providing low cost care. Although the justices concurred in striking down the exculpatory clause at issue in that case, Chief Judge Deen raised certain questions regarding the role of the court in finding public policy:

I concur fully with the majority opinion. However, I must add that the judiciary should whenever possible avoid establishing public policy, as this is the primary duty of the legislature. The courts generally should refrain from judicial law making through interpretation, legislation, or intervention in matters of public policy, unless the need and principle involved is clear and convincing. There are two purposes of public policy. One is of utility and one is of principle. Where the matter is one exclusively of utility, I definitely feel that the courts should not intervene or establish public policy, as this is best left to our elected representatives and lawmakers. But, as here, where the question is primarily a matter of interpretation and ascertainment of the best legal theory plus application of principle, then I believe this case is sufficiently clear and convincing that our court may in this limited situation extend the standard or rule of public policy as herein pronounced.¹³⁰

The cases of the past decade follow neither Judge Deen's restraint nor the distinctions made in his concurrence. A decision like

mary judgment in favor of Emory University School of Dentistry in a suit by a patient treated at a minimal cost. Other courts have applied the public policy formula to justify enforcing the exculpatory clause. See, e.g., *Hulsey v. Elsinore Parachute Center*, 168 Cal. App. 3d 333, 342, 214 Cal. Rptr. 194, 199 (1985) (the *Tunkl* analysis was held not applicable in a suit against a parachute jumping center); *Cregg*, 148 Cal. App. 3d at 1107, 196 Cal. Rptr. at 724 (a lessee's suit against a storage center was barred by the clause, and not a public interest contract under *Tunkl*); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn. 1982) (clause enforced against health spa customer, not a service of public interest); *Petry v. Cosmopolitan Spa Int'l, Inc.*, 641 S.W.2d 202, 203 (Tenn. Ct. App. 1982) (following the *Tunkl* criteria in upholding a clause in a health spa contract because it was not "generally thought suitable for public regulation").

128. 469 F. Supp. 914 (W.D.N.C. 1979), *aff'd without opinion*, 622 F.2d 587 (4th Cir. 1980).

129. 156 Ga. App. 602, 275 S.E.2d 163, *aff'd*, 248 Ga. 391, 282 S.E.2d 903 (1980).

130. *Id.* at 609, 275 S.E.2d at 169-70.

that in *Dixon v. Manier*¹³¹ is uncommon. There, the Tennessee court in excusing a school of cosmetology for its actions in causing loss of hair simply stated that "public policy of Tennessee favors freedom of contract against liability for negligence . . . [except for] a common carrier or those who have a specific duty imposed on them. . . ."¹³² The more generally discernible approach is to employ the public policy sword to deter the distasteful results of freedom of contract. The exculpatory clause is especially vulnerable to this attack as a theoretical principle, although the cases of the last decade do not yield a developed analysis of this point.

II. VITALITY

Having examined the vulnerability of exculpatory clauses under several legal theories, the obvious question presents itself: What accounts for the undeniable vitality of exculpatory clauses? Of the cases reviewed, approximately fifty-five percent of the exculpatory clauses at issue survived judicial scrutiny. We attempt here to offer some explanation for this favorable percentage.

A. Generally

It would seem that proponents pressing for the enforcement of exculpatory clauses would first use their strongest legal argument: the freedom of contract doctrine.¹³³ Traditionally, this doctrine has favored the adjustment of private interests among affected parties.¹³⁴ But the ethic is weakening and the scope of public interest is widening. This trend is evidenced by the enactment of protective legislation, the application of unconscionability principles, and the general erosion of a judicial attitude that has historically supported such doctrines as caveat emptor.

Putting aside the freedom of contract argument and the possibility of little or no negligence in the first instance,¹³⁵ the vitality of the

131. 545 S.W.2d 948 (Tenn. Ct. App. 1976).

132. *Id.* at 950.

133. "The public policy favoring freedom of contract prevails over any conflicting policies." *Kelley*, 123 Ill. App. 3d at 597, 462 N.E.2d at 1000 (where condominium owners sued the developers and others for damages based on structural defects).

134. The effect of this tradition can reach bizarre levels. Even a widow, distraught to find no room for her husband's body in the crypt purchased for him, was limited by the contractual agreement to accept a substitute crypt of equal value and similar location in the event of any error. *Aho v. Blanchette*, 18 Mass. App. Ct. 149, 463 N.E.2d 1203 (1984).

135. A number of decisions in favor of the defendant might be explained as benefiting from such favorable facts, particularly the decision of the Idaho Supreme Court involving a rider thrown from a horse by reason of a slipped cinch. *See Lee v. Sun Valley Co.*, 107 Idaho

exculpatory clause may be explained on grounds other than the philosophical and the psychological. It is offered here that the clauses may benefit from what we might call a "black hole" theory, a causation based analysis, and by reason of the presence of a number of "selected judicial techniques," all of which intersect the issue of exculpatory excuse.

B. *The Causation Factor or "Black Hole" Theory*

Do some exculpatory clauses benefit from a sense of fairness, arguably fueled by causation concerns? Are there cases where the harm suffered is not easily traceable to a single and simple instance of failure to exercise reasonable care? Or, perhaps, are there instances where the injury or damage was not primarily caused by the behavior of the defendant? For example, was there a likelihood of injury or damage from so many different sources and influences that reasonable people would not contract in the absence of some promised immunity? What if there exists in the mind of the judge or the jury a basic question as to where ultimate control lies? The extent and unforeseeability of factors beyond the parties' control—the "black hole" of causation—is perhaps what is contemplated by those whose well-drafted contracts were found to have effectively excused negligence or limited liability.

Although few cases explicitly address causation in connection with exculpatory clauses, the circumstances in *Mutual Marine Office, Inc. v. Atwell, Vogel & Sterling, Inc.*,¹³⁶ suggest recognition of the black hole theory described above. In that case, an independent inspector failed to disclose to a flood insurance company that the premises were located between 400 and 1,000 feet from the Susquehanna River. A flood caused damage and the insurer sought recovery from the inspector for the amount paid under the insured's claim. The court upheld an exculpatory clause which provided that the inspector assumed no legal liability for misinformation, inaccuracies or human error. Although the clause passed examination on grounds appropriate to other cases, the reader is struck by the court's parting remark that the insurer could not have cancelled the insurance in

976, 695 P.2d 361 (1984). Another example involved a Catholic school which failed to correctly diagnose appendicitis. The court in *Battig*, 482 F. Supp. 338 (W.D. La. 1979), enforced a provision releasing the school "from any and all liability of every nature" and granted summary judgment against the parents who sued when their child suffered a burst appendix. Although not explicitly addressing the question of negligence, the court's disinclination to invalidate this broad term bespeaks its implicit negative answer to the question.

136. 485 F. Supp. 351 (S.D.N.Y. 1980).

time even if it had received an accurate report from the inspector.¹³⁷

Simply because courts have avoided any discussion of causation does not mean that parties drafting exculpatory clauses have ignored the issue. Observe a typical burglar alarm and security contract, which provides:

[I]t is impractical and extremely difficult to fix the actual damages, if any, which may proximately result from a failure to perform any of the obligations herein, or the failure of the system to properly operate with resulting loss to Subscriber because of, among other things:

- a. The uncertain amount or value of property . . . which may be lost, stolen, destroyed, damaged. . . .
- b. The uncertainty of the response time of any police or fire department, should [they] be dispatched. . . .
- c. The inability to ascertain what portion, if any, of any loss would be proximately caused by Company's failure to perform or by failure of its equipment to operate;
- d. The nature of the service to be performed by Company.¹³⁸

Clauses such as this are regularly enforced, even in the face of large losses.¹³⁹ The law has become "case hardened."¹⁴⁰ In the words of a

137. *Id.* at 355.

138. *General Bargain Center v. American Alarm Co.*, 430 N.E.2d 407, 409 (Ind. Ct. App. 1982), where damages for a \$19,000 loss were limited to the contractual amount of \$250. Similar provisions permeate the industry. *See, e.g.*, *Chami v. Automatic Burglar Alarm Corp.*, 106 Misc. 2d 559, 560, 434 N.Y.S.2d 330, 331 (N.Y. Civ. Ct. 1980); *Greene St. Corp. v. AFA Protective Sys., Inc.*, 100 Misc. 2d 334, 335, 418 N.Y.S.2d 971, 972 (1979).

139. *Sanif, Inc. v. Iannotti*, 119 A.D.2d 654, 500 N.Y.S.2d 798 (N.Y. App. Div. 1986) (limitation of 10% of contract price or \$18 enforced against a retailer's claim for \$25,000 loss); *Allendale Mut. Ins. Co. v. Leaseway Warehouse, Inc.*, 624 F. Supp. 637 (N.D. Ill. 1985) (limitation enforced); *Tessler & Son, Inc. v. Sonitrol Sec. Sys., Inc.*, 203 N.J. Super. 477, 497 A.2d 530 (N.J. Super. Ct. App. Div. 1985); *Advance Burglar Alarm Sys., Inc. v. D'Auria*, 110 A.D.2d 860, 488 N.Y.S.2d 416 (1985) (clause enforced as not unconscionable); *Mankap*, 427 So. 2d 332 (Fla. Dist. Ct. App. 1983) (limitations clause upheld, but remanded for inquiry as to fraud); *West Side Loan Office v. Electro-Protective Corp.*, 167 Ga. App. 520, 306 S.E.2d 686 (1983) (clause upheld); *St. Paul Fire & Marine Ins. Co. v. Guardian Alarm Co.*, 115 Mich. App. 278, 320 N.W.2d 244 (1982) (\$250 limitation of liability enforced against claim of \$13,417 loss); *New England Watch Corp. v. Honeywell, Inc.*, 11 Mass. App. Ct. 948, 416 N.E.2d 1010 (1981) (clause upheld); *L. Luria & Son, Inc. v. Alarmtec Int'l Corp.*, 384 So. 2d 947 (Fla. Dist. Ct. App. 1980) (damages limited to six months rental fee against claim of \$135,000 loss); *First Fin.*, 69 Ill. App. 3d 413, 388 N.E.2d 17 (Ill. App. Ct. 1979) (a "hold harmless" provision probably means not even the \$500 recovery awarded by the jury); *Greene*, 100 Misc. 2d 334, 418 N.Y.S.2d 971 (N.Y. Civ. Ct. 1979) (clause upheld); *Central Alarm of Tucson v. Ganem*, 116 Ariz. 74, 567 P.2d 1203 (Ariz. Ct. App. 1977) (damages limited to six months rental fee against claim of \$17,044 loss); *Public Serv. Mut. Ins. Co. v. Royal Burglar & Fire Alarm, Inc.*, 90 Misc. 2d 517, 394 N.Y.S.2d 524 (N.Y. Civ. Ct. 1977) (clause upheld).

court sympathetic to a non-English speaking immigrant plaintiff with a \$10,000 loss in his first business venture, "[u]nfortunately, this court is restricted by the uniformity of decisions."¹⁴¹

This alarm company clause raises the serious issue of causation. It is quite proper to point out that the alarm system is a link, but sometimes a minor link, in the damage chain alleged by the plaintiffs. If one can rely upon the police department to respond quickly, if it is fair to speculate that the property will be recovered or that the fire will be put out when the alarm goes off, then the actual role of the alarm company takes on more significance. Obnoxious as it may be, an alarm company's poor response is really only a minor component in causation when viewed in the context of current police and fire systems. Accordingly, the vitality of the exculpatory clause seems justified.¹⁴²

What happens when one party simply assumes the risk of liability? Typically, such situations involve instances where the actors are "thrill seekers."

Despite the homage Americans pay to those who risk their lives in physical adventure, society is reluctant to grant blanket immunity to the actors for any untoward consequences.¹⁴³ If a high wire acrobat falls and suffers serious injury, the audience will be shocked but unwilling to compensate the acrobat on negligence grounds. In a sense, this assumption of total liability is the deal performers make when they agree to perform at their "own risk." Accordingly, those who parachute from airplanes, drive fast racing cars, or climb moun-

But see *Randall*, 516 F. Supp. 1122 (E.D. Pa. 1981) (limitation of liability unenforceable when jury determines there is gross negligence); *A & Z*, 90 A.D.2d at 803, 455 N.Y.S.2d at 675 (bargain problem precluded enforcement, and placement made it probable that it would escape attention); *Abel Holding Co. v. American Dist. Tel. Co.*, 147 N.J. Super. 263, 371 A.2d 111 (N.J. Super. Ct. App. Div. 1977) (failure of an alarm was due to pre-existing manually caused defect and therefore a tort was not covered by the clause).

140. *Todd*, 467 F. Supp. at 1298.

141. *Chami*, 106 Misc. 2d 559, 561, 434 N.Y.S.2d 330, 332 (N.Y. Civ. Ct. 1980).

142. The alarm contracts may more properly be characterized as including limitation of damages clauses rather than exculpatory clauses. *See infra* notes 208-13 and accompanying text. Nevertheless, modest amounts of damages in such cases are usually enforced by courts in the face of enormous losses because the causation concerns are too serious. However, to be effective, limitations clauses must apply to the event. For example, a \$250 limit was held to take effect only after the installation of the system. *Rothstein v. Honeywell, Inc.*, 519 So. 2d 1020 (Fla. Dist. Ct. App. 1987).

143. In *Dunn v. Paducah Int'l Raceway*, 599 F. Supp. 612 (W.D. Ky. 1984), where a race car driver died in an accident during the race, the court upheld the release with very little discussion of the facts or circumstances of the event. For an overview of this type of clause, see Note, *Shielding Against Future Negligence Liability: The Role of Exculpatory Contract Provisions in Personal Injury Actions*, 12 W.S.L.J. 819 (1985).

tains know or should know that they leap, drive and climb into their own "black hole" of harmful possibilities. The passive partner in this adventure, the prospective beneficiary of the exculpatory clause, also recognizes the many frightful and harmful possibilities and attempts to be excused should the possibilities become reality, even if "caused" by their own negligence.

The scenario most likely to result in enforcement of an exculpatory clause is presented in *Poskozim v. Monnacep*.¹⁴⁴ There, a parachutist broke his leg upon impact after his first jump and sued the company, alleging negligence in approving the boots he brought for the jump. Would the wrong boots always cause a broken leg? Are there more causal possibilities to an injury suffered upon landing than the role of the boots? The court did not ask these questions, but did deny the claim. Without so stating, it apparently viewed the plaintiff as having undertaken responsibility for the results of jumping into this particular black hole.¹⁴⁵

Simply stated, thrill seekers seem to be on their own where the possibilities of injury extend beyond the complete and practical control of the beneficiary of the clause or where the injury occurs as a result of a combination of actions, some of which are within the control of the thrill seeker. This line of thinking leads to a "black hole" theory, which has a rough sort of fairness to commend it. When a skydiver breaks his leg¹⁴⁶ or falls into a power line,¹⁴⁷ it seems equitable to conclude that the actor assumed the risk that such injuries would occur.

The spillover of this kind of thinking is illustrated in *Jones v. Dressel*.¹⁴⁸ In *Dressel*, a plaintiff was injured when a plane crashed shortly after take-off. The Colorado Supreme Court did not find it

144. 131 Ill. App. 3d 445, 475 N.E.2d 1042 (1985).

145. Plaintiff Poskozim relied upon *Diedrich v. Wright*, 550 F. Supp. 805, 806 (N.D. Ill. 1982), where the release applied only to "unforeseen and unforeseeable risks and hazards over which [the defendants] have no control." *Poskozim v. Monnacep*, 131 Ill. App. 3d 445, 448, 475 N.E.2d at 1044 (1985). In *Diedrich*, the court refused to release defendants from injuries that resulted from their direct negligence, and not from the dangers of the sport. The *Poskozim* court refused to reduce the scope of risk without that specific language before it. The lesson appears to be that by not pointing out the existence of the "black hole," proponents of the clause benefit from the judicial willingness to assume its broad reach.

146. *Cain v. Cleveland Parachute Training Center*, 9 Ohio App. 3d 27, 457 N.E.2d 1185 (1983).

147. *Id.* But see *Gross*, 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979) (clause not enforced due to concern about language used).

148. 623 P.2d 370 (Colo. 1981). Plaintiff first signed the clause while a minor, but the court held that he had ratified it by subsequent jumps after turning eighteen years of age. For a critique of this decision, see Note, *Exculpatory Clauses and Public Policy: A Judicial Dilemma*, 53 U. COLO. L. REV. 793 (1982).

necessary to consider plaintiff's allegations that the accident occurred because the plane ran out of gas. Rather, it affirmed the trial court's summary judgment against the plaintiff. Therefore, the court did not reach the issue of whether the plaintiff could have successfully waived the risk that the plane would malfunction due to the negligence of the provider. However, it seems that successful waiver in such cases is possible, since the risk that the plane may crash is knowable, within the sole control of the provider, and is one reasonable parties should be unwilling to waive.¹⁴⁹

Another example of the extension of black hole analysis is found in *Zimmer v. Mitchell & Ness*.¹⁵⁰ In that case, plaintiff was injured when his ski binding failed to properly release upon falling. His suit against the ski rental shop and others for providing defective equipment was decided against him on summary judgment. The appellate court held, and the Pennsylvania Supreme Court later affirmed, that the "Rental Agreement and Receipt" effectively shifted all responsibility for injury to the plaintiff, despite the absence of the word "negligence" in the agreement.¹⁵¹ A sharp dissent questioned the legitimacy of the bargain¹⁵² and raised the possibility that the negligence predated the signing of the agreement.¹⁵³ Nevertheless, the court left plaintiff exactly where he had stepped: into the "black hole" of both known and unknown danger, where anything can go wrong.

This "black hole" principle was also applied to participation in the Peachtree road race, a less obviously dangerous undertaking. In a particularly tragic accident, a Phi Beta Kappa law student suffered a form of brain damage when he collapsed during the run, which was held on July 4th in Atlanta, Georgia. He sued the sponsors of the race for failure to warn participants of the adverse effects of extreme heat and for failure to conduct physicals before allowing contestants to participate in the race. The plaintiff's suit was dismissed despite

149. Compare the reasoning in *Adams*, 686 S.W.2d 73 (Tenn. 1985), where plaintiff motorcycle-driver struck a steel photo-electric cell reflector near the finish line. He alleged that the reflector could and should have been made of more flexible material. The appellate court reversed the trial court's grant of summary judgment and allowed the plaintiff a chance to prove gross negligence.

150. 253 Pa. Super. 474, 385 A.2d 437 (1978), *aff'd*, 490 Pa. 428, 416 A.2d 1010 (1980).

151. *Id.* at 476, 385 A.2d at 439.

152. The dissenting judge argued that the failure to use the particular word "negligent" should be fatal to an otherwise enforceable clause. *Id.* at 480, 385 A.2d. at 442 (Hoffman, J., dissenting). See *supra* note 25 and accompanying text.

153. *Zimmer v. Mitchell & Ness*, 253 Pa. Super. 474, 481, 385 A.2d 437, 442 (1978).

the severity of his injury. The court ruled that plaintiff's waiver of liability on the part of the sponsors was "not contrary to law or morality."¹⁵⁴ In a sense, the black hole is truly a bottomless pit of unforeseeable forces, defying a search for causation and consequent liability for negligence.

The decade's cases provide affirmance of this thrill seeking doctrine. A go-kart driver,¹⁵⁵ a doctor practicing rescue maneuvers on Mt. Rainier,¹⁵⁶ a river raft passenger,¹⁵⁷ the survivors of a race-car driver killed in a collision on the track,¹⁵⁸ and a demolition derby crew member run over by a car¹⁵⁹ were all barred from pursuing claims because of releases in their contracts. Having stepped into the realm of danger and obvious risk, these actors encountered courts unwilling on agreement, power, or policy grounds to rescue them from their bargains.

Entities that cater to health seekers might hold a middle station in the black hole. Despite a lack of obvious danger to clients, health clubs typically employ exculpatory clauses in their contracts. These contracts are often negotiated as part of an extended introduction to the club. Although the health spa contract is similar to the specific and detailed agreement used by alarm companies, it bears a resemblance to thrill seeking releases in that the causation concerns underlying the exculpatory clause are generally not specified.

In the majority of cases reviewed, exculpatory clauses in health club contracts were upheld with little discussion.¹⁶⁰ Nevertheless, some courts were benevolent toward the actors in health club claims. Those cases reflected a greater concern with the bargaining process and public policy.¹⁶¹ In *Leidy v. Deseret Enterprises, Inc.*,¹⁶² for ex-

154. *Williams v. Cox Enters., Inc.*, 159 Ga. App. 333, 335, 283 S.E.2d 367, 369 (1981).

155. *Barnes v. New Hampshire Karting Assoc.*, 128 N.H. 102, 509 A.2d 151 (1986).

156. *Blide v. Rainier Mountaineering, Inc.*, 30 Wash. App. 571, 636 P.2d 492 (1981), *reh'g denied*, 96 Wash. 2d 1027 (1982).

157. *Franzek v. Calspan Corp.*, 78 A.D.2d 134, 434 N.Y.S.2d 288 (1980).

158. *Dunn v. Paducah Int'l Raceway*, 599 F. Supp. 612 (W.D. Ky. 1984).

159. *La Frenz*, 172 Ind. App. 389, 360 N.E.2d 605 (1977).

160. *See, e.g., Lovelace v. Figure Salon, Inc.*, 179 Ga. App. 51, 345 S.E.2d 139 (1986) (injury sustained while strengthening leg muscles in preparation for surgery); *Schlobohm*, 326 N.W.2d 920 (Minn. 1982) (plaintiff aggravated a pre-existing back injury on leg-extension machine); *Petry*, 641 S.W.2d 202 (Tenn. Ct. App. 1982) (back injury caused by collapse of exercise machine); *Kubisen v. Chicago Health Clubs*, 69 Ill. App. 3d 463, 388 N.E.2d 44 (1979) (plaintiff failed to assert unawareness of clause). In each instance, the bargaining process and policy concerns were found fair and fulfilled.

161. In *Schlobohm*, both the bargaining process and public interest concerns were addressed in detail. "Before signing the membership contract, [plaintiff] had the opportunity and did 'somewhat' read the context of the contract." *Schlobohm*, 326 N.W.2d at 922. The court found no ambiguity, no disparity of bargaining power, and no application of the *Tunkl* policy concerns. *Id.* at 922-25.

162. 252 Pa. Super. 162, 381 A.2d 164 (1977).

ample, a woman who was treated at a spa upon a referral by her physician suffered injuries because the treatment given was the opposite of that requested. In refusing to enforce the exculpatory clause in the spa's contract, the court drew an analogy between a statutory licensing scheme for physical therapists and the activities carried out by the spa. The court also mentioned the underlying public policy of promoting a therapeutic relationship between health clubs and their patrons.¹⁶³

Although the "black hole" theory of causation helps explain the vitality of the exculpatory clause, exceptions to the doctrine exist where public policy concerns are strong. These concerns often lead to the denial of exculpatory clause enforcement. For example, although the court in *Sexton v. Southwestern Auto Racing Assoc., Inc.*,¹⁶⁴ acknowledged a policy of enforcing assumption of risk agreements, it nevertheless required close scrutiny of the bargain between a pitman and the racing association. In this case, the circumstances surrounding the contract and the possibility of misrepresentation were important factors because the pitman, who was injured when a racecar crashed through barriers at a track, may not have understood that he was signing a release of liability.¹⁶⁵ Similarly, an exculpatory clause was not enforced against a child injured in a stampede of horses on a trail ride at Disneyworld because the clause was ambiguous.¹⁶⁶ According to the court, there was a "complete absence of any language indicating the intent to either release or indemnify the defendant for its own negligence."¹⁶⁷

Exculpatory clauses thus enjoy a certain vitality when invoked by those serving the thrill seekers of this country. Although judges can scrutinize the transaction itself, the bargaining position of the parties, and certain public policy concerns, they rarely do. Instead, the participatory nature of the subject matter involved in the agreement and the vast number of potential hazards provide sufficient justification for courts to allow the parties to allocate their own risks among themselves.

163. Some states have invalidated exculpatory clauses in health clubs by statute. See, e.g., N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1978).

164. 75 Ill. App. 3d 388, 394 N.E.2d 49 (1979).

165. *Id.* at 389, 394 N.E.2d at 50-51.

166. *O'Connell*, 413 So. 2d 444 (Fla. Dist. Ct. App. 1982).

167. *Id.* at 447.

C. *Other Rationalizations*

Structurally, exculpatory clauses are contractual provisions that create or deny certain rights. Exculpatory clauses are treated here as establishing the freedom to commit negligence while performing a contract. Yet, the legal system characterizes some clauses of an exculpatory nature by other legal means. Such clauses are recognized by a variety of legal terms. For instance, the law of sales, with its repertoire of disclaimers, liquidated damages, and limitation of remedies,¹⁶⁸ gives substance and respectability to exculpation. Further, certain occupational situations can be made more conducive to the recognition of exculpatory clauses when the facts of these cases are framed in certain specified terms.¹⁶⁹ Included in the latter group are the construction industry's "no damage for delay" clauses, commercial allocation situations,¹⁷⁰ and clauses benefiting from policies carved out of regulated or semi-regulated industries. We offer here the thesis that exculpatory clauses have more vitality when framed in one of these contexts.

1. *No Damage for Delay*

A disclaimer is a renunciation of a right. Disclaimers can appear in varying legal forms. For example, the practice in the construction industry of inserting "no damage for delay" clauses in contracts is, in effect, a disclaimer for the offense of delay.¹⁷¹

General attempts to excuse substandard behavior contemplate

168. See, e.g., *S. M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. 1978), a typical limitation of remedy case where the contractual provision was effective against the buyer of a tunnel-boring machine. In the case of a bank permitting their customer's wife unauthorized access to a safety deposit box, a limitation excusing liability "unless gross negligence, fraud, or bad faith" was effective and distinguishable from other state law in that it was not a "full" exculpatory clause. *Federal Deposit Ins. Corp. v. Carre*, 436 So. 2d 227 (Fla. Dist. Ct. App. 1983), *petition denied*, 444 So. 2d 416 (Fla. 1984).

169. There is also a downside risk in using other theories. In *Hall v. Skate Escape, Ltd.*, 171 Ga. App. 178, 319 S.E.2d 67 (1986), for example, a customer was injured while using rented skates. He characterized the problem as a bailment situation. The bailment argument diluted the effect of the clause because Georgia statutory public policy regarding bailments requires the lessor to warrant "that the thing bailed is free from any secret fault." *Id.* at 179, 319 S.E.2d at 69 (citing GA. CODE ANN. § 44-12-63).

170. For example, in enforcing a waiver of subrogation clause in a contract for the purchase of a prepackaged home, the court noted that the waiver was "not even a true exculpatory clause," as the parties really agreed "to shift most of the risk . . . to a third party, namely [plaintiff's] insurance company." *Bastian v. Wausau Homes, Inc.*, 635 F. Supp. 201, 203 (N.D. Ill. 1986).

171. For an excellent review of these clauses, see Lesser, *The Validity, Force and Effect of No Damage for Delay Clauses*, 62 FLA. B.J. 21 (1988).

absolution for an infinite number of negative effects. Unlike these, the language of no damage for delay clauses pleads for immunity from a particular type of behavior. A typical no damage for delay clause reads:

The Contractor agrees to make no claim for damages for delay in the performance of this contract occasioned by any act or omission to act of the City or any of its representatives, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work as provided herein.¹⁷²

No damage for delay clauses are common to the building industry. As such they are governed by principles suited to the problems for which they are created. For instance, in *Kalisch-Jarco, Inc. v. City of New York*,¹⁷³ a heating contractor who was the successful bidder under an eight-million dollar contract involving the construction of New York police headquarters sued to recover delay damages from the City. The above quoted clause was the contractor's principal barrier to relief. The contractor attributed the delay solely "to the city's 'endless' revisions of scores of plans and drawings, to its failure to co-ordinate the activities of its prime contractors, and to other acts of omission or commission interfering with the sequence and timing of the work."¹⁷⁴

The New York Court of Appeals reversed the trial court's award of nearly one-million dollars to the heating contractor. The court's majority ruled that the jury must find something more than the defendant's active interference¹⁷⁵ in the performance of the contract to award damages. The court also held that a party's passive or active conduct does not determine wrongdoing. Consulting a dictionary, the majority stated that the plain meaning of "interference" and its synonym, "intervention", do not "connote willfulness, maliciousness, abandonment, [or] bad faith."¹⁷⁶ Hence, a no damage for delay

172. *Kalisch-Jarco, Inc. v. City of New York*, 58 N.Y.2d 377, 380, 448 N.E.2d 413, 414, 461 N.Y.S.2d 746, 747 (1983).

173. 58 N.Y.2d 377, 448 N.E.2d 413, 461 N.Y.S.2d 746 (1983).

174. *Id.* at 381, 448 N.E.2d at 414, 461 N.Y.S.2d at 747. In delay law, this defense is sometimes called "active interference." "Active interference is merely one of the several expressions which courts have used in discussing a broad range of willful wrongdoing beyond the sufferance of an exculpatory clause." *Id.* at 386 n.7, 448 N.E.2d at 417 n.7, 461 N.Y.S.2d at 750 n.7. Revisions of a contract by the owner qualify as active interference. A strong dissent in *A & M*, 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (1982), outlines how revisions should be classified.

175. *Kalish-Jarco*, 58 N.Y.2d at 386, 448 N.E.2d at 417, 461 N.Y.S.2d at 750.

176. *Id.*

clause would survive unless there was evidence that the City "acted in bad faith and with deliberate intent delayed the plaintiff in the performance of its obligation."¹⁷⁷

The no damage for delay clause seems to be particularly durable.¹⁷⁸ Of the seven cases reviewed, the clause was only struck down in one instance for technical reasons¹⁷⁹ and in another upon a showing of active interference.¹⁸⁰ The vitality of the clause derives its rationale both from economics and from the belief that the parties are mature players able to take care of themselves. No damage for delay provisions are part of the economic package upon which the parties agree. The contractor who chooses to accept these risks will reflect the accompanying responsibility in his price.¹⁸¹

2. Allocation of Risk

The emphasis on economics in cases involving no damage for delay clauses is a recognition that the allocation of risk is the underlying purpose of all contracts. Partners adjusting the allocation of risk provide a good illustration of this principle.¹⁸² Also, parties who contemplate negligence usually designate responsibility for insurance coverage in the contract.

Public policy arguments against the enforcement of exculpatory clauses appear muted against a backdrop of insurance coverage issues.¹⁸³ An issue of subrogation usually triggers a policy argument.

177. *Id.* at 386, 448 N.E.2d at 418, 461 N.Y.S.2d at 751. In *Corinno Civetta Constr. Corp. v. New York*, 67 N.Y.2d 297, 299, 493 N.E.2d 905, 907, 502 N.Y.S.2d 681, 683 (1986), the contract clauses covered a broad range of reasonable and unreasonable conduct but could not excuse behavior that "smacks of intentional wrongdoing."

178. The clause was upheld in *Corinno*, 67 N.Y.2d at 297, 493 N.E.2d at 905, 502 N.Y.S.2d at 681; *Novak & Co. v. New York City Hous. Auth.*, 125 Misc. 2d 647, 480 N.Y.S.2d 403 (N.Y. Sup. Ct. 1984); *John E. Green Plumbing & Heating, Inc. v. Turner Constr. Co.*, 742 F.2d 965 (6th Cir. 1984), *cert. denied*, 471 U.S. 1102 (1985); *Broadway Maintenance Corp. v. Rutgers, State Univ.* 90 N.J. 253, 447 A.2d 906 (N.J. 1982).

179. *Shintech, Inc. v. Group Constructors, Inc.*, 688 S.W.2d 144 (Tex. Ct. App. 1985), where there appeared to be conflicting clauses.

180. *Phoenix Contractors, Inc. v. General Motors Corp.*, 135 Mich. App. 787, 355 N.W.2d 673 (1984), where there was no delay per se, but substantial extra cost to the heating and plumbing subcontractor due to active interference.

181. *Broadway*, 90 N.J. at 270, 447 A.2d at 914.

182. *628 Harvard Assocs. v. Pensacola Warehouse, Ltd.*, 483 So. 2d 132 (Fla. Dist. Ct. App. 1986), where the contractual limitation of liability among limited partners was upheld.

183. *See, e.g., Board of Educ.*, 46 N.Y.2d 653, 389 N.E.2d 798, 416 N.Y.S.2d 202 (1979), where a property owner lost even though New York public policy voids contracts attempting to limit liability resulting from negligence in real property situations. In *Fairchild for Use and Benefit of State Farm Fire & Casualty Co. v. W.O. Taylor Commercial Refrigeration & Electric Co.*, 403 So. 2d 1119 (Fla. Dist. Ct. App. 1981), the court found that although the parties could bargain for and shift the risk of loss, they could not make the provi-

In *South Tippecanoe School Bldg. Corp. v. Shambaugh & Son, Inc.*,¹⁸⁴ for example, an insurance company, as subrogee to the land owner, attempted to hold the contractor liable for losses resulting from a gas explosion and fire at the construction site. The contract provision requiring the owner to procure insurance relieved the contractor of liability for its negligence. Likewise, in *Insurance Company of North America v. Avis Rent-A-Car System, Inc.*,¹⁸⁵ the issue was whether and to what extent insurance coverage can serve as a source of indemnification for financial loss resulting from negligent operation of a rental car. Once the insured's beneficiaries were compensated by the owner of the rental car, the parties (owner, lessee, and insurer) could contract among themselves to shift the burden of loss.

3. Regulated Industries

Many lawyers remember the old railroad hypothetical from law school days. It went something like this:

Central Railroad operated wood burning locomotives. They also built and leased wooden structures for warehouse purposes. These warehouses were located next to the tracks. Sometimes the warehouses would be set on fire by sparks from the locomotives. The contents of the warehouse were also destroyed. The lease contained a clause which would, among other things, "indemnify and save harmless the lessor as a result of fire, regardless of the lessor's negligence."

Because necessity required warehouses to be situated near the zone of risk, the clause was valid as a proper assumption of risk by the commercial tenant.¹⁸⁶

Whether the same assumption of risk rationale can be applied to other railway activities is not evident from cases decided during the last decade. None of the five railroad-related cases reviewed involved fire-breathing engines.¹⁸⁷ A tenant in *Graham v. Chicago*

sion obscure and indefinite.

184. 182 Ind. App. 350, 395 N.E.2d 320 (1979).

185. 348 So. 2d 1149 (Fla. Sup. Ct. 1977).

186. This rationale was recently expressed in *Alabama Great S. R.R. v. Sumter Plywood Corp.*, 359 So. 2d 1140, 1145 (Ala. 1978), where the Alabama Supreme Court noted the long history of upholding clauses in agreements between railroad companies and their lessees that exempted railroads from liability due to fire damage caused by sparks.

187. In one case, *Illinois Cent. Gulf R.R. v. Pargas, Inc.*, 722 F.2d 253 (5th Cir. 1984), the railroad was only a third party in a case where a clause disclaiming liability for all consequential damages was upheld. The railroad suffered damages when a tank car leaked liquified petroleum gas on the tracks.

*Rock Island & Pacific R.R.*¹⁸⁸ sued the railroad for damages to a building caused by a derailed train. In *Caribbean Produce Exchange, Inc. v. Sea Land Service, Inc.*¹⁸⁹ a shipper successfully sued a railroad for the loss of tomatoes caused by an atmosphere control problem in the railcars.¹⁹⁰ The tenant survived a motion for summary judgment and the tomato shipper benefitted from a tariff imposed on the industry. The defendant in *Lamoille Grain Co. v. St. Johnsbury & Lamoille County Rail Road*¹⁹¹ successfully pleaded that an exculpatory clause barred a claim of negligence in a derailment that toppled several grain storage bins. A clause was not successful, however, in *Alabama Great Southern Rail Road v. Sumter Plywood Corp.*¹⁹² where damage to drop-bin loaders on a siding resulted from a railroad employee's failure to notice that a railroad car was attached to the bin when it was moved. The salient fact in *Alabama Great Southern* was the plaintiff's lease of property to an entity other than the railroad. Thus, the case was "not incident to an ownership of land by [the railroad]; by lease or otherwise."¹⁹³ It should be noted that the case was overruled to the extent that it expressed a philosophical disapproval of exculpatory clauses in Alabama.¹⁹⁴

Bargains made with regulated industries are sometimes outlined by the government. For example, the master contract in a utility franchise, the tariff, may protect the utility by limiting the amount and type of liability for damages caused by the utility.¹⁹⁵ The tariff was successful in a power outage case,¹⁹⁶ but not in a water company case¹⁹⁷ where business property owners charged that there was insufficient water pressure to extinguish a fire. In the latter instance,

188. 431 F. Supp. 444 (W.D. Okla. 1976).

189. 415 F. Supp. 88 (D.C.P.R. 1976).

190. Unless a consignee receives some consideration for a limitations clause, such as a change in rates, the clause will not hold. In this instance the shipper paid the higher rate. *Id.* at 94.

191. 135 Vt. 5, 369 A.2d 1839 (1976).

192. 359 So. 2d 1140 (Ala. 1978).

193. *Id.* at 1146.

194. *Industrial Tile, Inc. v. Stewart*, 388 So. 2d 171, 176 (Ala. 1980).

195. Power and light companies, for example, are generally not liable for the loss of food in a freezer where power is interrupted, regardless of the reason for the failure. Consolidated Edison successfully used the limitations of liability set forth in the rate schedule filed with the public service commission in *Lee v. Consolidated Edison Co. of New York*, 98 Misc. 2d 304, 413 N.Y.S.2d 826 (N.Y. App. Term. 1978) where outage damages were charged. The limitation was enforced even though "customers are not afforded the opportunity to purchase greater liability protection at increased rates." *Id.* at 306, 413 N.Y.S.2d at 828.

196. *Id.* at 304, 413 N.Y.S.2d at 826.

197. *De Francesco*, 329 Pa. Super. 508, 478 A.2d 1295 (1984).

the court viewed the clause excusing the water company for "any loss or damage for any deficiency in the pressure, volume, or supply of water due to any cause"¹⁹⁸ to be void as against public policy. Not only was the company in the best position to reduce the risk, but the customer was unaware of the clause.¹⁹⁹

Exculpatory clauses fared better in cases involving the yellow pages from telephone books. Although telephone companies are regulated, the publication of advertising is not.²⁰⁰ Nevertheless, publishers appear to be beneficiaries of the protection given to the regulated arm of their operations. Of the five cases reviewed, would-be advertisers withstood exculpatory clauses only when there was evidence of fraud. For example, in *Morgan v. South Central Bell Telephone Co.*,²⁰¹ the plaintiff periodontist recovered when the telephone company failed to list his business four times in succession and never properly informed plaintiff that a written contract was necessary for advertisement. However, a doctor of osteopathy,²⁰² an engineering firm,²⁰³ and a business customer²⁰⁴ all lost in their quests for damages resulting from their exclusion from the yellow pages listings. The exculpatory language of the various clauses contested insulated the telephone companies from liability, despite judicial appreciation of the fact that the "yellow pages are a unique advertising device for which there is no practical substitute."²⁰⁵

4. Sales Exculpatory Techniques

Exculpatory thought is institutionalized through codification in the Uniform Commercial Code (UCC). The full weaponry of legal excuse, including disclaimers, liquidated damages and limitations of remedy provision, is available to the thoughtful buyer or seller of goods within the UCC. In a broad sense, these statutory rules

198. *Id.* at 515, 478 A.2d at 1306.

199. *See also John's Pass*, 369 So. 2d at 618, where the lessor of a boat dock was not immunized from liability for damage caused by fire because he had neglected to provide proper equipment, which was negligence per se.

200. *McClure*, 101 Ill. App. 3d at 1112, 428 N.E.2d at 1154.

201. 466 So. 2d at 111.

202. *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St. 2d 147, 375 N.E.2d 410 (1978).

203. *McClure*, 101 Ill. App. 3d at 1109, 428 N.E.2d at 1151.

204. *Louisville Bear Safety Serv., Inc. v. South Cent. Bell Tel. Co.*, 571 S.W.2d 438 (Ky. Ct. App. 1978).

205. *Id.* at 439. Consistent with the exculpatory nature of the limitations clause, plaintiff's claim for \$26,440 in compensatory damages and \$100,000 in punitive damages was reduced to an award of \$1,440, the cost of the ad.

breathe vitality into excuse by reason of the UCC's precise treatment of exculpatory language. A simple example establishes the necessary background.

Assume that a merchant seller contracts to supply 1,000 baby chicks to a chicken farmer. The farmer has made known to the seller that the chicks are necessary to meet an existing supply commitment. The seller assures the farmer that the chicks will meet his needs. It turns out that the chicks suffer from bird cancer and soon die. Under the UCC's implied warranty of merchantability provision,²⁰⁶ the seller has breached his contract to sell healthy birds. He is liable for this breach.²⁰⁷ The damages recoverable by the buyer may include consequential or special damages flowing from the buyer's contract with a third party.

If the seller wishes to excuse his failure to deliver healthy birds by contract, he must make certain determinations when contracting under the UCC. For example, he could verbally refuse to promise to deliver healthy birds under the UCC's implied warranty of merchantability provision. However, such an action would hardly be a good business tactic. So, the seller would probably promise to deliver healthy chicks, restricting his potential liability by negotiating a limitation of remedy provision or a liquidated damages clause. Either of these devices could bar, or limit, the buyer's recovery of damages resulting from any loss suffered. The UCC orchestrates the Seller's action through several sections.

Section 2-718(1). Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy.

Section 2-719(1)(a): [T]he agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts.

Section 2-719(3). Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.

The UCC polices limitation practices through various methods.

206. U.C.C. § 2-314 (1978).

207. *Vasles v. Montgomery Ward and Co.*, 377 F.2d 846 (3d Cir. 1967).

Disclaimers,²⁰⁸ for example, must be negotiated²⁰⁹ and structured rather precisely.²¹⁰ The language must be specific and its manifestation conspicuous.²¹¹ The limitation of remedies provision²¹² faces the specific tests of unconscionability and review as to whether circumstances cause an exclusive or limited remedy to "fail of its essential purpose."²¹³

UCC cases illustrate the complexity of the UCC policing process. In *Posttape Assoc. v. Eastman Kodak Co.*,²¹⁴ a movie producer purchased 105 four hundred foot rolls of Ektachrome film for a movie. The shooting took two-and-one-half days. When the film was processed it showed scratches. Apparently, the film was negligently manufactured. The film producer sued Kodak and was awarded \$143,000 at trial, despite the fact that the contract contained a clause limiting the recovery of damages to the replacement of the film. The

208. A distributor's action against a manufacturer for indemnification for a defective product sold to a customer was not allowed because of the warranty disclaimer. *Thermo King Corp. v. Strick Corp.*, 467 F. Supp. 75, *aff'd*, 609 F.2d 503 (3d Cir. 1979).

209. In *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936 (2d Cir. 1980), an airline purchased an airplane under a contract waiving all liability caused by the seller's negligence. The plane crashed in Moscow, killing fifty-two persons. The apparent cause of the crash was the absence of a "spoiler system" to bring the plane to a halt. The disclaimer was enforced among the insurers. In *Marr Enters., Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951 (9th Cir. 1977), the owner and lessee of a fishing vessel was unsuccessful against the seller of a refrigeration system installed to combat bacteria growth.

210. In deciding a risk of loss clause in *American Empire Ins. Co. v. Koenig Fuel & Supply Co.*, 113 Mich. App. 496, 317 N.W.2d 335 (1982), the court held that the U.C.C. still requires specific disclaimer language. The loss of 10,000 tons of coal due to a fire negligently caused was not excused by an attempted disclaimer that "we will not be responsible for loss due to fire or theft." *Id.* at 498, 317 N.W.2d at 336.

211. *Atlas Mut. Ins. Co. v. Moore Dry Kiln Co.*, 38 Or. App. 111, 589 P.2d 1134 (1979) (fire damages recovery, as between insurer as subrogee of sawmill, was limited and the disclaimer effective because the language was in bold face and conspicuous).

212. In *Cash v. Armco Steel Corp.*, 462 F. Supp. 272 (N.D. Ga. 1978), a pipe manufacturer was sued when a dam failed. The limitation of remedy provision barred the contract claim for consequential damages. However, the plaintiff tried a tort claim and was permitted to proceed, the court stating that "the contract must be clear and unequivocal in its warning that the buyer thereby waives his common law right to recover any damages which might result from the seller's negligence, even in a commercial context." *Id.* at 276.

213. U.C.C. § 2-719(2) (1978). *See, e.g., Mostek Corp. v. Chemetron Corp.*, 642 S.W.2d 20 (Tex. Ct. App. 1982), a products liability case in which the buyer of nitrogen sued the seller on theories of breach of warranty, negligence, and strict liability in tort when the buyer's plant had to be closed down due to the contaminated product. The limitation of remedies clause was generally found effective as to the warranty and negligence claim. *Id.* at 25. However, it was not found effective against the strict tort claim. Note the court's provision: "If, however, [plaintiff] is able on remand to establish that the limitation of remedy failed of its essential purpose, [plaintiff] should be allowed recovery for breach of warranty as provided in the Illinois Commercial Code." *Id.* at 27.

214. 537 F.2d 751 (3d Cir. 1976).

appellate court reversed, sending to the jury the issue of whether the practice of restricting a remedy to "replacement only" was a trade custom.²¹⁵ The jury answered in the affirmative, finding also that the limitation of remedy did not fail of its essential purpose and was not unconscionable. Interestingly, the appellate court viewed the exculpatory nature of this latter finding as involving distinguishable parts:

We note at the outset that defendant does not seek complete exculpation, but instead desires to limit plaintiff's recovery. Though it is possible that an agreement setting damages at a nominal level may have the practical effect of avoiding almost all culpability for wrongful action, the differences between the two concepts is nevertheless a real one.²¹⁶

The UCC's unconscionability section, 2-302, appears to act as surrogate for the common law principles here discussed. Under this section, one need not charge gross negligence, intentional tort, failure of the language of the clause, or the like in order to recover.

The exculpatory policies of general law appear to be subsumed in the developing UCC law on unconscionability. However, the UCC provisions track the result, if not the technique, of the old principles. For example, in *A & M Produce Co v. FMC Corp.*²¹⁷ the court expressed the anti-exculpatory feeling evident in the operation of UCC principles by describing the parties as an "enormous diversified corporation and a relatively small but experienced farming company."²¹⁸ The farming company had purchased from FMC a weight sizing machine that did not work properly. The company sued FMC and was awarded a considerable sum. The issue on appeal was whether a purported disclaimer of warranties and a limitation on the buyer's ability to recover consequential damages were effective.²¹⁹

The court chose to use the UCC unconscionability doctrine.²²⁰ It struck down both the disclaimer clause and the consequential damage clause despite a finding that the seller could show technical compliance with requirements of the UCC section governing exclusion or modification of warranties. A review of the totality of the

215. *Id.* at 758.

216. *Id.* at 755.

217. 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (1982).

218. *Id.* at 489, 186 Cal. Rptr. at 124.

219. *Id.* at 482-84, 186 Cal. Rptr. at 119-20 (citing and discussing U.C.C. § 2-719). See *supra* notes 208-13 and accompanying text, and U.C.C. § 2-302 (the unconscionability provision of the U.C.C.).

220. *A & M*, 135 Cal. App. 3d at 482, 186 Cal. Rptr. at 119.

circumstances by the court included the business environment within which the contract was executed. The court concluded that when non-negotiable terms on preprinted form agreements combine with disparate bargaining power, resulting in the allocation of commercial risks in a socially or economically unreasonable manner, the concept of unconscionability as codified furnishes legal justification for refusing enforcement of the offensive result.²²¹ The opinion offers strong support for the view that, although the viability of exculpatory clauses depends on technical compliance, unconscionability principles may offer a different and superior result in reference to the totality of the bargain.²²²

Some patterns of commercial activity benefit from the particular legal techniques noted in this section. Liquidated damages clauses have a considerable history of acceptance in certain aspects of the construction industry and in the alarm and security business.²²³ The insurance industry recognizes allocation of risk doctrines, and exculpatory clauses have genuine vitality in regulated industries. Finally, the law of sales has incorporated the exculpatory clause into its overall scheme.

III. CONCLUSION

Having examined the range of cases concerning exculpatory clauses, several questions present themselves. Are the issues as simple as Pilate's? No. Are exculpatory clauses alive and well? Yes, but with a delicate nature. Was Corbin's test or the *Tunkl* formula actually used by the judges? Yes, but only in a few cases. Can the proponent of the clause improve the odds of its being enforced? Yes.

In nearly 55% of the cases reviewed, exculpatory clauses were approved by courts. Thus, it seems accurate to say that a majority of courts support exculpatory clauses, although their status is undeniably fragile. The standard for enforcement suggested by Corbin,²²⁴

221. *Id.* at 493, 186 Cal. Rptr. at 126.

222. Although the disclaimer was conspicuous, its terms did not immediately attract attention. Further, even if there were no unfair surprise, "there is ample evidence of unequal bargaining power here and a lack of any real negotiation over the terms of the contract." *Id.* at 492, 186 Cal. Rptr. at 125.

223. The burglar alarm business apparently utilizes all three species of exculpation. While there is an occasional true attempt at exculpation, such as in *Allendale Mut. Ins. Co. v. Leaseway Warehouse, Inc.*, 624 F. Supp. 637 (N.D. Ill. 1985), more generally they are manifested as liquidated damage clauses, save harmless provisions, and an occasional denial of consequential damages. See *supra* notes 208-13, their accompanying text, and the discussion directly previous thereto.

224. See *supra* note 5 and accompanying text.

requiring an examination of the nature of the service, the propriety of the bargain and the degree of negligence sought to be excused, informs but does not permeate the case law. The California Supreme Court's formula, pronounced in *Tunkl*, adds certain detail to the inquiry. The *Tunkl* formula has been adopted as a measure of public policy by some courts. However, the number of decisions citing either *Corbin* or *Tunkl* in this study was very small—less than five percent.

The expected contractual benefit of an exculpatory clause—the shift of liability for negligence—is highly dependent upon judicial appreciation of both the form and content of the bargain, the relationship of the parties, and the constraints of statutory and judicial public policy. But the courts do not seem overly concerned with enforcing generally applicable standards. Each case is evaluated on its facts with concern for what may well be a sense of personal fairness.

The perfect exculpatory clause appeared when the following circumstances were present. Two (1) "big fellows" (2) bargained that (3) one would procure insurance covering damages arising from (4) "negligent" acts over a subject matter where (5) neither the Legislature nor previous courts had condemned the clause on public policy grounds. Thus, the proponent of an exculpatory clause has certain avenues to pursue in maximizing the chances that the clause will be enforced.

The bargain which produces an exculpatory clause must be even-handed. Presenting the clause in an obvious setting and drawing it in obvious terms lends credibility to the transaction. Using the word "negligence" and limiting the excused conduct to "ordinary" failure to use reasonable care seems to enhance judicial willingness to recognize the freedom to contract. In the same vein, creating the opportunity to reflect upon the terms of the agreement enhances the chance for its success. A doctor whose patient agrees to an exculpatory clause on the operating table is in trouble; the doctor's office would be a much more acceptable venue for bargaining. The prolonged introduction to health club facilities and the extended opportunity to review the health club contract is another example of a favorable bargaining milieu. Others could perhaps profit by these models, especially landlords in jurisdictions where exculpatory clauses in leases have not yet been declared void.

The reach of the excuse should be clear. Defenses to public policy arguments might include a definition of the expected negligence with particularity and the characterization of the excused behavior as "reasonable." Alarm company contracts and recreational arrange-

ments are instructive in this regard. Identifying the possibility of "substandard" behavior in advance may also increase the likelihood that the parties will be seen to have properly and fairly bargained, since an excuse of negligence is less offensive if mentioned at the outset. After all, judges are schooled in the notion that contracting is an exercise in risk allocation, best left to an informed society.

By extension, the causation question offers the proponent of an exculpatory clause the opportunity to increase its probability for success. When the range of forces likely to cause injury is beyond an individual's control, contractual agreements excusing the proponent's negligence are well-received. Again, the alarm and recreation cases stand as successful paradigms. Ensuring that the signor of an exculpatory clause appreciates the many ways in which he or she can be injured in a race-car derby or in a health club seems to satisfy the judicial sense of fairness. The no damage for delay clauses also provide a valuable lesson in this regard. An employer might behave in ways that would make an inquiry into the reasonableness of its conduct a futile exercise. Therefore, it is important that the range of causation concerns be clearly explained and well understood.

Obviously, a lawyer will be helpless to avoid statutory public policy clearly proscribing certain excuses in some transactions. However, few statutes are so worded. In most cases, the drafter of a clause will need to read the statute, study the language, identify the mischief the Legislature intended to restrict, and behave reasonably.

Perhaps the most viable way to ensure the enforcement of an exculpatory clause is to cast it in judicially approved terms. Disclaimers, limitations of remedies, and liquidated damages clauses are positive legal concepts statutorily embraced by the Uniform Commercial Code. Avoiding naked exculpatory clauses and adopting these techniques will accomplish the goal of enforcement.

In sum, the drafter of an exculpatory clause can maximize the possibility that a future court will accept the clause by carefully tailoring the circumstances of the bargaining process, the language of the contract, and the extent of the excuse. If challenged in court, the proponent of the clause would do well to point to any strong elements of fairness present in the transaction. The freedom to contract is also a strong argument which can easily persuade courts, particularly if it is claimed that the freedom should only be abridged by legislative fiat.

